FILE COPY

FILED
AUG 31 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 358

HOOPESTON CANNING CO., E. PRITCHARD, INC., ET AL.,

Appellants,

vs.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

FRANKLIN D. TRUEBLOOD,
Counsel for Appellants.

INDEX.

Subject Index.

	Page
tatement as to jurisdiction	1
Date of judgment and application for appeal	2
Statutory provisions sustaining jurisdiction	4
State statutes the validity of which is involved	9
Nature of the case	9
Substantial nature of Federal questions	12
Cases believed to sustain the jurisdiction	12
xhibit "A"—Decision of the Supreme Court of New York, Albany County, Trial Term	15
xhibit "B"—Final judgment of the Supreme Court of New York, Albany County, Trial Term	42
xhibit "C"—Notice of appeal to Appellate Division	47
xhibit "D"—Decision of the Appellate Division of the Supreme Court of New York	48
xhibit "E"—Final order of reversal by Appellate Division	55
xhibit "F"—Judgment of Supreme Court	59
xhibit "G"—Notice of appeal to the Court of Appeals of New York	61
xhibit "H"—Opinion of the Court of Appeals	62
xhibit "I"—Order and judgment of the Court of Appeals	72
xhibit "J"—Order of the Supreme Court making the order and judgment of the Court of Appeals its order and judgment	74
xhibit "K"—Order of the Supreme Court dismissing the complaints	75

Table of Cases Cited.

etna Life Ins. Co. v. *Dunken*, 266 U. S. 389	11, 12
llgeyer v. *Louisiana*, 165 U. S. 578	11, 12
aldwin v. *Seelig*, 294 U. S. 511	12

Page

Bell's Gap R. R. Co. v. *Pennsylvania*, 134 U. S. 232 14
C., B. & Q. Railroad Co. v. *McGuire*, 219 U. S. 549 13
Chicago Life Ins. Co. v. *Needles*, 113 U. S. 574 14
Concordia Fire Ins. Co. v. *Illinois*, 292 U. S. 535 13
Dorchy v. *Kansas*, 272 U. S. 306 14
Edwards v. *California*, 314 U. S. 160 13
Engel v. *O'Malley*, 219 U. S. 128 13
Fidelity & Deposit Co. v. *Tafoya*, 270 U. S. 426 13
Firemen's Ins. Co. v. *Beha*, 30 F. (2d) 539, 278 U. S. 580 11
Frost v. *Corporation Commission*, 278 U. S. 515 13
Hanover Fire Ins. Co. v. *Harding*, 272 U. S. 494 13
Hartford S. B. I. & I. Co. v. *Harrison*, 301 U. S. 459 13
Home Ins. Co. v. *Dick*, 281 U. S. 397 14
Louisville Gas & E. Co. v. *Coleman*, 277 U. S. 32 13
McArthur v. *United States*, 315 U. S. — (No. 950, October Term, 1941, decided March 30, 1941) 11
McLean v. *Arkansas*, 211 U. S. 539 13
Mayflower Farms v. *Ten Eyck*, 297 U. S. 266 13, 14
Minnesota Commercial Men's Association v. *Benn*, 261 U. S. 140 11
Mutual Life Ins. Co. v. *Cohen*, 179 U. S. 262 12
Nashville C. & St. L. R. Co. v. *Wallace*, 288 U. S. 249 14
Nebbia v. *New York*, 291 U. S. 502 13
New York Life Ins. Co. v. *Head*, 234 U. S. 149 13, 14
Palmetto Fire Ins. Co. v. *Conn*, 272 U. S. 295 13
St. Louis Cotton Compress Co. v. *Arkansas*, 260 U. S. 346 11, 12
Terral v. *Burke*, 257 U. S. 529 13
Zucht v. *King*, 260 U. S. 174 11

STATUTES CITED.

Constitution of the United States, 14th Amendment
Insurance Law of the State of New York (Chapter, 882, found at pages 2530 et seq., in Volume 2 of the Laws of 1939 of the State of New York, being Chapter 28 of the Consolidated Laws of New York):
Section 5 10

	Page
Section 40(1)	10
Section 41(3)	10
Section 130	2, 5, 8
Section 168(2)	2, 3, 8
Section 345(1)	6
Section 410(1)	3, 8
Section 410(2)	10
Section 412(1)	2, 3, 5, 6, 8
Section 413(2)	2, 3, 8
Section 415(1)	2, 3, 8
Section 415(1d)	2, 3, 8
Section 415(1e)	2, 3, 8
Section 417(1)	2, 3, 5, 6, 8
Section 418(1)	2, 3, 5, 6, 8
Section 418(3)	2, 4, 6
Section 420	2, 4, 8
Section 421	2, 4, 6, 8
Section 422(1)	2, 4, 8
Judicial Code, Section 237a, as amended (28 U. S. C. A. 344a) and Section 1 of the Act of January 31, 1928 (c. 14, 45 Stat. 54) and the Act of April 26, 1928 (c. 440, 45 Stat. 466)	2
New York Civil Practice Act:	
Section 473	4
Section 592	7
Section 612	6
Patterson "The Insurance Commissioner in the United States", pp. 90, 91	10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 358

HOOPESTON CANNING CO., A CORPORATION; E. PRITCHARD, INC., A CORPORATION; LANSING B. WARNER, INCORPORATED, A CORPORATION; HARRY M. BROWN AND JAMES T. SMITH, PAUL E. EMERSON AND BEN A. MORTON,

Appellants,

vs.

LOUIS H. PINK, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND JOHN J. BENNETT, JR., AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK,

Appellees.

JURISDICTIONAL STATEMENT.

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, appellants submit herewith their statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain the appeal in the above entitled consolidated cause from a final order and judgment of the Court of Appeals of the State of New York dated June 5, 1942, and entered June 23, 1942, and from the final order and judgment of the Supreme Court of the State of New York, Albany County, entered thereon on June 23, 1942. Applications

for appeal was presented to the chief judge of the Court of Appeals of the State of New York on July 29, 1942, and by him refused. Application for said appeal to the Supreme Court of the United States was presented on August 6th, 1942.

(1) The statutory provisions which sustain the jurisdiction of the Supreme Court of the United States to entertain the appeal in this case are Section 237 (a) of the Judicial Code of the United States, as amended (28 U. S. C. A., Sec. 344 (a)), and Section 1 of the Act of Congress of January 31, 1928 (c. 14, 45 Stat. 54), as amended by the Act of Congress of April 26, 1928 (c. 440, 45 Stat. 466), which provide that the Supreme Court of the United States may review, upon appeal, a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

(2) The statutes of the State of New York, and portions thereof, the validity of which is drawn in question in this cause, are Section 130; Section 168, subsection 2; Section 410, subsection 1; Section 412, subsection 1; Section 413, subsection 2; Section 415, subsection 1; Section 415, subsections 1(d) and 1(e); Section 417, subsection 1; Section 418, subsections 1 and 3; Section 420; Section 421 and Section 422, subsection 1, of the Insurance Law of the State of New York (Chapter 882, found at pages 2530, et seq., in Volume 2, of the Laws of 1939 of the State of New York, being Chapter 28 of the Consolidated Laws of said State), which statutes are set out verbatim in the decision of the trial term attached hereto, marked "Exhibit A," and made a part hereof. The pertinent provisions of the aforesaid statutes may be summarized as follows: Section 130, as

construed by appellees prior to the commencement of these actions and by the Court of Appeals of the State of New York, requires all appellants' contracts of inter-insurance insuring New York risks to be issued, or effectuated through, or countersigned by, an agent resident in New York, although all such contracts are made and to be performed outside of said State; Section 168, subsection 2, requires contracts of inter-insurance on New York risks to conform in all particulars to the standard fire insurance policy of the State of New York; Section 410, subsection 1, imposes on the "Advisory Committee," subject to the Articles of Association and Power of Attorney, ultimate powers of management of the affairs of the subscribers; Section 412, subsection 1, prohibits anyone from cooperating in appellants' insurance who does not have net assets in excess of ten thousand dollars, without reference to the amount of insurance he may carry, or the cost for which he may be liable; Section 413, subsection 2, requires appellants to build up and maintain a special contingent surplus in a stated amount in such a manner as to deprive those exchanging the contracts of their individual ownership of the funds and to impose upon them a joint liability to the extent of their interest in said fund; Section 415, subsection 1, requires the Power of Attorney to be executed in a manner sufficient for the acknowledgment of conveyances of real estate in the State in which the subscriber is domiciled; Section 415, subsection 1(d) prescribes the method of electing members to the Advisory Committee, and Section 415, subsection 1(e), requires the Advisory Committee to make regulations for the control and custody of funds; Section 417, subsection 1, requires every contract of inter-insurance to provide for a contingent liability in an amount of not less than one nor more than ten times the amount of "the annual premium expressed in such contract;" Section 418, subsection 1, requires each subscriber to build up op-

erating reserves in an amount equal to the larger of (a) Twice the amount of the so-called annual premium, or (b) the subscriber's pro-rata share of an aggregate operating reserve of one-half of one per cent of the aggregate amount of insurance in force; Section 418, subsection 3, imposes a joint liability on each subscriber to the extent of the operating reserve; Section 420 subjects all appellants' assets and the aforesaid operating reserves to the payment of liabilities under the contracts of inter-insurance and thereby imposes a joint liability upon the subscribers to the extent of said assets; Section 421 requires each subscriber's account to be credited with premiums earned by him as an underwriter; and Section 422, subsection 1, requires appellants to maintain at least one office in the State of New York.

(3) For a statement of the nature of the case, the rulings of the State courts and the basis upon which it is contended that this Court has jurisdiction of this cause under Section 237(a) of the Judicial Code the appellants respectfully show:

The appellants brought two actions in the Supreme Court of the State of New York, Albany County, for a declaratory judgment and injunction under Section 473 of the New York Civil Practice Act on November 1, 1939, against the appellees Louis H. Pink, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney General of the said State, alleging that they sued on behalf of two groups of persons, firms, and corporations, known as subscribers who, scattered throughout the United States, exchange in Illinois pursuant to the laws of that State contracts of inter-insurance against loss or damage by fire; that the statutes, and portions thereof, above enumerated, as against appellants, are invalid as violative of Section 1 of the Fourteenth Article of Amendment to the Constitu-

tion of the United States, providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The appellees answered the complaints, and the actions having been consolidated, came on for trial. The appellants introduced evidence tending to establish invalidity of the statutes in question. At the conclusion of the trial the cause was submitted on the written briefs of the parties in which the questions arising under the Constitution of the United States were elaborately argued. The theory upon which the case was presented was that the statutes in question, as applied to appellants, were invalid under the due process clause for lack of jurisdiction because all contracts of appellants are made and to be performed outside of the State of New York; that the statutes, except Section 130, the countersignature statute, are invalid under the due process clause on the ground of unreasonable regulation; and that Section 412, subsection 1, prohibiting a person from participating in this insurance who does not have a net worth of more than ten thousand dollars, is also invalid under the equal protection clause because of a discrimination against the small business man who cannot qualify thereunder; that Section 418, subsection 1, requiring appellants to build up and maintain reserves in excess of the reserves required of insurance companies is likewise invalid under the equal protection clause because a discrimination against appellants, as is Section 417, subsection 1, requiring every contract of inter-insurance to provide for a contingent liability in an amount of not less than one nor more than ten times the amount of "the annual premium expressed in such

contract," whereas Section 345, subsection 1, of the said Insurance Law provides no limitation whatever to the contingent liability of members of a mutual fire insurance company.

On December 10, 1940, the Court handed down its decision, a true copy thereof marked "Exhibit A" being hereto attached and made a part hereof, sustaining appellants' contentions under the equal protection clause as to Section 412, subsection 1, and Section 418, subsection 1, but denying the contention as to Section 417, subsection 1; and sustaining in part appellants' contentions under the due process clause as to unreasonable regulation, the Court holding the remainder of the statutes to be valid and constitutional. Said decision declared the statutes to be valid and applicable under the due process clause on the ground of jurisdiction except that it held that Section 130 (the countersignature statute) had no application to appellants' contracts, all of which were issued, delivered or otherwise effectuated outside the State of New York. Appellants submitted requests to the Trial Term to find each of the statutes, except Section 130, invalid under the Constitution of the United States, which were refused except as to Section 412, subsection 1; Section 418, subsection 1; Section 418, subsection 3; and Section 421, which were allowed. Final judgment based on the aforesaid decision was entered in the Supreme Court, Albany County, on April 5, 1941, a true copy thereof marked "Exhibit B" being hereto attached and made a part hereof.

Within the time prescribed by Section 612 of the New York Civil Practice Act both sides appealed from the aforesaid final judgment of the Trial Term to the Appellate Division of the Supreme Court, Third Department. Appellants in their Notice of Appeal, a true copy thereof marked "Exhibit C" being hereto attached and made a

part hereof, specifically stated that they appealed from the judgment of the Trial Term holding the statutes enumerated in said Notice of Appeal to be valid and constitutional. The appeal having been perfected, the Federal constitutional questions were argued before the Appellate Division both orally and in the briefs. On July 2, 1941, the Appellate Division filed its decision, a true copy thereof marked "Exhibit D" being attached hereto and incorporated herewith, reversing the judgment of the Trial Term and declaring all of the statutes in question to be invalid and inapplicable as against appellants because violative of the Constitution of the United States. In its final order of reversal, a true copy thereof marked "Exhibit E" being hereto attached and made a part hereof, the Appellate Division found that appellants' contracts of interinsurance are neither made nor performed in the State of New York, that appellants have no resident agents in the said State, that appellants have no representatives, resident or otherwise, empowered to receive an application, issue a policy, adjust or pay a loss within the confines of the State of New York, and that appellants do not solicit Subscribers. A judgment giving effect to the foregoing order of reversal was entered in the Supreme Court on September 2, 1941, a true copy thereof marked "Exhibit F" being hereto attached and made a part hereof.

Within the time prescribed by Section 592 of the New York Civil Practice Act the appellees filed a Notice of Appeal, a true copy marked "Exhibit G" being hereto attached and made a part hereof, to the Court of Appeals of the State of New York from each and every part of the aforesaid final order of reversal and judgment. The appeal having been perfected, the cause came on for hearing, and the Federal constitutional questions were again argued orally and in the briefs. On June 4, 1942, the

Court of Appeals filed its decision, a true copy marked "Exhibit H" being hereto attached and made a part hereof, reversing the final order of reversal of the Appellate Division.

By an order and judgment dated June 5, 1942, a true copy thereof marked "Exhibit I" being hereto attached and made a part hereof, the Court of Appeals reversed the aforesaid order of reversal of the Appellate Division and judgment based thereon and remitted the records and proceedings in the case to the Supreme Court, State of New York. Thereupon, on June 23, 1942, the Supreme Court, Albany County, ordered that the aforesaid order and judgment of the Court of Appeals be made the order and judgment of said Supreme Court. A true copy of said order of the Supreme Court is annexed hereto marked "Exhibit J" and made a part hereof. And on the same day, to-wit, June 23, 1942, a final judgment dismissing the complaints and for costs was duly entered by the Supreme Court, Albany County, a true copy thereof marked "Exhibit K" being hereto attached and made a part hereof.

The question whether Section 130, Section 168, subsection 2; Section 410, subsection 1; Section 412, subsection 1; Section 413, subsection 2; Section 415, subsection 1; Section 415, subsections 1(d) and 1(e); Section 417, subsection 1; Section 418, subsections 1 and 3; Section 420; Section 421; and Section 422, subsection 1, of the Insurance Law of 1939 of the State of New York as applied to appellants violate the due process and equal protection clauses of the Fourteenth Amendment was therefore raised in the complaints filed by appellants in the Court of first instance, passed upon by the Trial Term, presented to the Appellate Division and decided by that Court in favor of appellants, presented by appellees to the Court of Appeals, and decided by that Court against appellants. It is evident,

therefore, that appellants have exhausted their remedies in the State courts and have obtained a decision by the highest State court in which a determination of this cause is obtainable, and therefore this Court has jurisdiction of this cause under Section 237 (a) of the Judicial Code.

(4) For a statement of the grounds upon which it is contended that the questions involved are substantial the appellants respectfully show:

The appellants comprise two groups of carefully selected persons, firms, and corporations, known as Subscribers, who cooperate in carrying their own fire insurance at actual cost, which the State of New York is now seeking to regulate. One of these groups is confined to Subscribers engaged in the canning industry, while the other group is limited to Subscribers engaged in the wholesale grocery business and allied lines. Insurance is effected by exchanging under the Illinois law contracts of indemnity of a private nature, in which each Subscriber assumes an individual and several liability for his proportionate part of any loss. As a fund out of which this liability is paid, each Subscriber deposits funds which remain his separate property until used or returned. The Subscribers in the canners group have on hand aggregate deposits exceeding four million dollars; the Subscribers in the wholesale grocery group have on hand aggregate deposits exceeding one and one-half million dollars. Roughly, about ten per cent of the Subscribers reside in the State of New York, and both groups are licensed in that state. The canners group, using the same Power of Attorney throughout, has been in existence thirty-five years, while the wholesale grocers group, using substantially the same Power of Attorney throughout, has been in existence for thirty years.

The record contains the uncontradicted evidence of appellants' officer that the application of a majority of these

New York statutes to appellants would destroy their system of cooperative insurance. In the opinion of the witness what is at stake is not a mere matter of increased expense, serious as that would be, or of increased inconvenience in the pursuit of the cooperative plan, but the right of business men of good character to cooperate with one another in carrying their own insurance as they have carried it for the past thirty to thirty-five years. It is in evidence that appellants' loss ratio is only about one-half the loss ratio of ordinary insurance carriers, while, through the elimination of the agency system, common to practically all insurance companies, appellants save approximately twenty-five per cent in insurance costs. No insurance in America is comparable to the system here under review.

Under Section 41, subsection 3, of the Insurance Law of New York as construed by the Court of Appeals in this case, the appellants are doing an insurance business in the state as to local risks, although all contracts are made and to be performed outside of New York. Under Section 40, subsection 1, and Section 410, subsection 2, of the Insurance Law no person, firm, association or corporation shall do an insurance business in New York unless licensed. Section 5 makes every violation of the Insurance Law a misdemeanor punishable under the general law. Thus, even if they desired to do so, appellants could not escape regulation by surrendering their New York licenses. But, as this Court knows, the giving up of a license in the field of insurance is always accompanied by danger to the reputation of the insurer, as such a course subjects the insurer to the whispered attacks of unscrupulous and malicious persons. Patterson, *The Insurance Commissioner in the United States*, pp. 90, 91.

The appellants respectfully submit that the questions under the Constitution of the United States properly raised and necessarily decided by the state courts and now before

this Court on appeal are substantial federal questions within the rule of *McArthur* v. *United States*, 315 U. S. —, and *Zucht* v. *King*, 260 U. S. 174, 176, 177. The Court of Appeals did not cite a single authority in the Supreme Court of the United States to support its decision. It ignored the relevant authorities in this Court cited by appellants to sustain the decision of the Appellate Division. The sole authority cited by the Court of Appeals was a District Court case, *Firemen's Ins. Co.* v. *Beha*, 30 F. (2d) 539 (affirmed on a procedural point by this Court in 278 U. S. 580). The Appellate Division, however, in sustaining appellants' contentions of invalidity, cited *Allgeyer* v. *Louisiana*, 165 U. S. 578, 591; *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346, 349; *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389, 399; and *Minn. Commercial Men's Association* v. *Benn*, 261 U. S. 140, 145.

The appellants contend that the challenged statutes violate the due process clause of the Fourteenth Amendment on the ground that New York has no jurisdiction over appellants' contracts of inter-insurance made and to be performed outside the state, even though the property insured and the owner thereof are in the state, and secondly, that the statutes alleged in the complaints are unreasonable, arbitrary and capricious without any reasonable relation to the end sought to be attained. Appellants also contend that the statutes violate the equal protection clause of the Fourteenth Amendment in that Section 412, subsection 1, prohibits a person from participating in this insurance who does not have a net worth of more than ten thousand dollars and therefore is a discrimination against the small business man who cannot qualify; that Section 418, subsection 1, discriminates against appellants by requiring them to build up and maintain reserves in excess of the reserves required of insurance companies; and that Section 417, subsection 1, requires every contract of inter-insurance

to provide for a contingent liability in an amount of not less than one nor more than ten times the amount of "the annual premium expressed in such contract," whereas Section 345, subsection 1, of the said Insurance Law provides no limitation whatever to the contingent liability of members of a mutual fire insurance company. The Trial Term sustained appellants' contentions under the equal protection clause as to Section 412, subsection 1, and Section 418, subsection 1, but not as to Section 417, subsection 1, and also sustained appellants' contention in part as to reasonable regulation, but denied appellants' contention of lack of jurisdiction under the due process clause. As previously noted, the Appellate Division reversed the Trial Term as to jurisdiction and held all of the statutes inapplicable and invalid as violative of the federal constitution.

This Court has held on a number of occasions that a state has no jurisdiction to regulate contracts of insurance relating to risks within its limits between a citizen and non-resident insurers made and to be performed in another state.

St. Louis Cotton Compress Co. v. *Arkansas*, 260 U. S. 346, 349.

Aetna Life Ins. Co. v. *Dunken*, 266 U. S. 389, 399.

Allgeyer v. *Louisiana*, 165 U. S. 578, 591.

Mutual Life Ins. Co. v. *Cohen*, 179 U. S. 262, 269.

See also:

Baldwin v. *Seelig*, 294 U. S. 511, 521,

This Court has indicated that statutes imposing regulations of the same general type as those imposed by the statutes here challenged, and under circumstances generally similar to the circumstances of this case, are invalid under the due process clause, because unreasonable, arbitrary, and capricious, without any reasonable relation to the object sought to be attained.

Nebbia v. *New York*, 291 U. S. 502, 525.
McLean v. *Arkansas*, 211 U. S. 539, 548.
C. B. & Q. Railroad Co. v. *McGuire*, 219 U. S. 549, 569.

This Court has ruled, under circumstances generally similar to the circumstances here involved, that statutes that impose the same general type of regulations and prohibitions as those imposed by the aforesaid Section 412, subsection 1; Section 418, subsection 1; and Section 417, subsection 1, are invalid under the equal protection clause.

Frost v. *Corporation Commission*, 278 U. S. 515, 522.
Hartford S. B. I. & I. Co. v. *Harrison*, 301 U. S. 459, 461.
Mayflower Farms v. *Ten Eyck*, 297 U. S. 266, 272, 274.
Concordia Fire Ins. Co. v. *Illinois*, 292 U. S. 535, 545, 549.
Louisville Gas & E. Co. v. *Coleman*, 277 U. S. 32, 37.
Engel v. *O'Malley*, 219 U. S. 128, 138.

See also:

Edwards v. *California*, 314 U. S. 160.

This Court has frequently ruled that a state may not compel non-resident insurers to give up rights guaranteed by the federal constitution as a condition to the granting or retaining of a license.

New York Life Ins. Co. v. *Head*, 234 U. S. 149, 163.
Hanover Fire Ins. Co. v. *Harding*, 272 U. S. 494, 507.
Fidelity & Deposit Co. v. *Tafoya*, 270 U. S. 426.
Terral v. *Burke*, 257 U. S. 529.
Palmetto Fire Ins. Co. v. *Conn.*, 272 U. S. 295, 304.

The questions here presented for determination have therefore been decided by the prior decisions of this Court in favor of the appellants and are substantial questions deserving review.

(5) The following cases support the jurisdiction of the Supreme Court of the United States in this cause:

Nashville, C. & St. L. R. Co. v. *Wallace*, 288 U. S. 249;
Home Ins. Co. v. *Dick*, 281 U. S. 397, 405;
New York Life Ins. Co. v. *Head*, 234 U. S. 149, 159, 160;
Mayflower Farms v. *Ten Eyck*, 297 U. S. 266;
New York ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, 67, 68;
Dorchy v. *Kansas*, 272 U. S. 306, 308, 309;
Chicago Life Ins. Co. v. *Needles*, 113 U. S. 574, 579;
Bell's Gap R. R. Co. v. *Pennsylvania*, 134 U. S. 232, 236.

Respectfully submitted,

HOOPESTON CANNING CO.,
E. PRITCHARD, INC.,
LANSING B. WARNER, INCORPORATED,
HARRY M. BROWN,
JAMES T. SMITH,
PAUL E. EMERSON,
BEN A. MORTON,
Appellants,

By FRANKLIN D. TRUEBLOOD,
Their Counsel.

EXHIBIT "A".

SUPREME COURT OF THE STATE OF NEW YORK,
ALBANY COUNTY.

HOOPESTON CANNING CO., a Corporation, E. PRITCHARD, INC., a Corporation, Lansing B. Warner, Incorporated, a Corporation, Harry M. Brown and James T. Smith, Plaintiffs,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney General of the State of New York, Defendants

HOOPESTON CANNING CO., a Corporation, E. PRITCHARD, INC., a Corporation, Lansing B. Warner, Incorporated, a Corporation, Paul E. Emerson and Ben A. Morton, Plaintiffs,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney General of the State of New York, Defendants

Albany Trial Term—March 1940

Wiswall, Walton, Wood & McAffer, Esqs., for plaintiffs.
Zane, Trueblood & Johnson, Esqs., of counsel.
John J. Bennett, Jr., Attorney General for defendants.
Vincent Kiebala, Assistant Attorney General, of counsel.

Opinion, by Schirick, J.

Two actions have been tried together, before the Court without a jury. The action in which Ben A. Morton is a party plaintiff will, for convenience, be referred to as the first action. The action in which James T. Smith is a plaintiff will, for like reason, be referred to as the second action.

The first action is brought on behalf of approximately twenty one hundred persons, firms, and corporations, of whom some two hundred and thirty are residents of the State of New York. All of these persons are engaged in the wholesale grocery business. Since 1912 they have ob-

tained insurance against loss by fire by a system of reciprocal insurance devised and operated by the plaintiff, Lansing B. Warner, Inc., an Illinois corporation. The system contemplates that each member, called a "subscriber," exchange contracts of insurance with every other member of the group. The agency through which the exchange is effected is Lansing B. Warner, Inc., as attorney in fact. The group is designated as Warner Reciprocal Insurers. The group is not associated nor united in any manner, save in the common aim to secure this type of insurance. One seeking to obtain such insurance must file an application with the Agent in Chicago, and execute a document known as Appointment of Agent. By virtue of this appointment, the agent, Lansing B. Warner, Inc., is authorized to execute, in his behalf, contracts of insurance. The Agent selects the individuals, firms, or corporations to be admitted to the scheme. It maintains a staff to service the risks. It receives proofs of loss and is empowered to compromise and pay claims.

Annually each subscriber makes a "deposit" with the Agent of a sum which roughly corresponds with the premium which would be charged by an "old line" company upon a similar risk. Title to such deposit remains in each subscriber. The liability of each subscriber is several, and is limited in amount to the sum deposited by him, and also the amount of his "reserve". The liability of each subscriber on any loss is fixed by the ratio of that subscriber's deposit to the total deposits. The Agent retains twenty percent of the deposit as its compensation, out of which operating expenses must be paid. That portion of the deposit which remains unused after the payment of losses and agent's compensation each year is known as a "saving". A portion of this is used to build up a reserve fund. One-fifth of it is given to the Agent as additional compensation. The balance is annually returned to the subscriber.

The Appointment of Agent provides for the appointment of "Advisers". These meet periodically. Their functions are largely limited to the deposit and investment of assets, and the countersigning of checks. They do not supervise the Agent, nor do they exercise authority over him. The Agent is the ultimate power in the scheme.

The second action involves a similar reciprocal insurance group. This group is composed of nine hundred seventy-six persons, firms, and corporations, engaged in the canning industry. Ninety three of these are located in New York State. This group is known as Canners Exchange Subscribers at Warner Inter-Insurance Bureau. This group, with minor exceptions, is identical in operation with the Warner Reciprocal Insurers.

By virtue of Chapter 882 of the Laws of 1939, the Insurance Law of the State of New York, was extensively revised. Various provisions were enacted which purport to regulate the activities of reciprocal insurers. The plaintiffs maintain that such regulations may not constitutionally be applied to them. They assert that if applied to them, these provisions would constitute a deprivation of their property without due process of law. The actions have been brought for a declaratory judgment declaring such provisions to be invalid as against the plaintiffs and for an injunction restraining the defendants from enforcing such law.

Lansing B. Warner, Inc., as agent or attorney in fact, of both groups, has been extremely zealous to localize the activities of these groups in the City of Chicago, Ill.

Application blanks, and blank forms for a power of attorney, are mailed to the prospective subscribers from the Chicago office. These are returned to Chicago by mail. To determine such prospect's eligibility, the Attorney-in-Fact makes an investigation of his credit rating and reputation for honesty. A trained insurance engineer is sent out from Chicago to inspect the property and report his findings. He also may advise the prospective subscriber as to the methods whereby the risk may be decreased. Existing subscribers are consulted regarding the desirability of admitting the applicant to the scheme.

If satisfied with his qualifications, the Attorney-in-Fact accepts the applicant's Power of Attorney. Thereupon, he executes a contract of inter-insurance, and mails it to him from Chicago. The deposit is sent to Chicago by mail.

Once the power of attorney has been executed and accepted, it continues in force until revoked. The subscribers in both groups have been fairly constant. New applications are not frequent.

Losses are paid at the discretion of the Attorney-in-Fact and checks are sent by mail from the Chicago office. In the event of an unusual loss, an inspector is sent to view the property. He has not authority to enter into an adjustment.

There are no agents. New applications are not solicited, save such recommendations as a subscriber may make to his friends and associates. It is not disputed that the record of these groups has been high, both in their financial standings, and in their payment of losses. It is conceded that the subscribers have saved from thirty to fifty per cent in the cost of their fire insurance by reason of their use of this method of reciprocal insurance. The reasons for such savings are mainly two: 1) the elimination of the agency system, with its costly commissions, 2) careful selection of subscribers, resulting in a lower loss ratio than among ordinary companies.

Both groups are licensed to transact insurance business in the State of Illinois. Since 1930 they have been also licensed in New York. This has been done, the plaintiffs assert, to secure two advantages 1) the appointment of the Superintendent of Insurance as agent for the service of process in New York, and 2) the filing of annual financial statements. They deny that they have been under any obligation to secure such license. Since 1936, they have been paying a tax upon their net income received from subscribers in New York State, though not admitting the validity of such tax. It is stipulated that their activities have been in a substantial compliance with the law as it existed prior to the enactment of the Insurance Law of 1939. It is stated in the complaints in both actions that they are desirous of qualifying under the valid provisions of the new law and of securing a license thereunder.

The following provisions of the Insurance Law are here challenged:

Sec. 130 (1) "Except as provided in subsection two, no licensed foreign or alien insurer shall in this state issue, deliver or otherwise effectuate any contract of insurance covering either persons resident in this state or property situated in this state, or covering any risk incident to the

performance or non-performance of any contract or obligation to be performed in this state, or covering any risk incident to any obligation or duty which is governed by the laws of this state though actually to be performed elsewhere, unless such contract of insurance is issued or effectuated through, or countersigned by, a resident licensed insurance agent of this state. Within the meaning of this section, a licensed individual insurance agent shall be deemed to be resident in this state if he has his domicile or his principal place of business in this state, and a licensed corporation insurance agent shall be deemed to be resident in this state if it maintains a lawfully established place of business in this state; and a licensed firm or association insurance agent shall be deemed to be resident in this state if it maintains an established place of business in this state."

Sec. 168 (2). "No policy or contract of fire insurance, including a renewal of such policy or contract, shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in this state, unless it shall conform in all particulars as to size of type, as to location of blank spaces, and as to all provisions, agreements and conditions, with such printed blank form of policy (the standard form of the National Convention of Insurance Commissioners); and no other or different provision, agreement or condition shall be in any manner made a part of such contract or policy, except as follows:"

Sec. 410 (1) "Within the meaning of this chapter the term "reciprocal insurer" shall mean any aggregation of persons, firms or corporations, herein called "subscribers", who or which under a common name engage in the business of inter-insurance or exchanging contracts of insurance on the reciprocal plan through an attorney-in-fact having authority to obligate the subscribers severally, within such limits as may lawfully be specified in the power of attorney, on contracts of insurance made with any subscriber as a policyholder through such attorney-in-fact acting on behalf of all other subscribers. For the purposes of this chapter, the term "reciprocal insurer" shall include any reciprocal

or inter-insurance exchange, by whatever name known, and any reference thereto as an insurer shall be deemed to mean any such aggregation of inter-insurers operating through an attorney-in-fact individually and collectively as an insurance organization for the benefit of its policyholders. The term "advisory committee" as used in this chapter, shall be deemed to include any official body, by whatever name called, which is chosen by the subscribers of a reciprocal insurer, and which has, subject to the articles of association and subscribers agreement, ultimate power and responsibility and control of the affairs of a reciprocal insurer."

Sec. 412 (1) "No authorized reciprocal insurer shall make any new agreement for insurance with any person, firm or corporation who or which does not have assets in his, their or its own right in an amount not less than ten thousand dollars in excess of liabilities, as shown by a commercial agency report, as hereinafter provided, or by a sworn statement on file with the attorney-in-fact, verified by such subscriber or by an officer of a corporation subscriber.

Before renewing a contract of insurance with a subscriber, similar proof of financial responsibility shall be required, unless the subscriber has accumulated and maintains the subscriber's operating reserve required by section four hundred eighteen. The report of an established commercial agency having one hundred thousand or more subscribers shall be deemed presumptive evidence of the financial condition of a subscriber."

Sec. 413 (2) "Every authorized reciprocal insurer, at the end of the first and every succeeding calendar year following the effective date of this chapter, and in the case of a reciprocal insurer hereafter authorized, at the end of each full calendar year of doing business in this state, shall accumulate and maintain a special contingent surplus or guaranty surplus, by whatever name called, at the rate of one per cent of its net premium income for each such year as reported in its annual statement, until such contingent surplus shall be at least equal to the amount of minimum

surplus required in section four hundred eleven. Such contingent surplus shall not be impaired by dividend distributions or by refunds or returns of continuing or retiring subscribers' reserves or deposits except in the event of the liquidation of such reciprocal insurer under order of a court. Any such reciprocal insurer may set aside the entire amount of the contingent surplus herein required or accumulate such surplus at a rate in excess of that herein required; but such contingent surplus once set aside, shall be thereafter maintained unimpaired except as to the amount, if any, in excess of the minimum surplus required by section four hundred eleven."

Sec. 415: (1) "Every subscriber of an authorized reciprocal insurer shall have executed a subscriber's agreement, and every subscriber hereafter executing such a subscriber's agreement shall execute and duly acknowledge the same, in a manner sufficient for the acknowledgment of conveyances of real property to be recorded in the state in which such subscriber is domiciled, and every subscriber's agreement shall be identical in terms, except as to the date and the name and address of the subscriber, with all other subscriber's agreements currently in force and effect with all other subscribers of such reciprocal insurer. Every such subscriber's agreement shall contain in substance the following provisions:

* * * * * * *

(d) A provision that there shall be an annual meeting of the subscribers, in person or by proxy, at a time and place to be determined in accordance with such agreement, of which each subscriber shall be duly notified and at which each subscriber shall have power to vote in person or by proxy for all members of the advisory committee to be chosen or appointed at such time."

Sec. 417: (1) "Every contract of insurance and every power of attorney of the attorney-in-fact or subscriber's agreement under or by which contracts of insurance are issued or exchanged by any authorized reciprocal insurer shall provide for a contingent several liability for assess-

ment of the subscriber as an inter-insurer on the risks of every other subscriber in an amount not less than one nor more than ten times the amount of and in addition to the annual premium expressed in such contracts of insurance issued to the subscriber by the reciprocal insurer."

Sec. 418: 1. "Every subscriber of an authorized reciprocal insurer shall be required to accumulate a minimum operating reserve, to be credited to such subscriber on the books and records of such reciprocal insurer, by authorizing the attorney-in-fact to credit to such account at the end of the fiscal year of such reciprocal insurer, an amount not less than one quarter of such subscriber's earnings as an underwriter during such period. Such accumulation shall be made if and at least so long as such subscriber's operating reserve is less than the larger of the following amounts: (a) Twice the amount of the annual premium or premiums in force as of such date on all policies issued to such subscriber by the reciprocal insurer: or (b) such subscriber's pro rate share, determined on the basis of annual premiums in force, of an aggregate operating reserve for such reciprocal insurer equal to one-half of one per cent of the aggregate amount of fire insurance in force in such reciprocal insurer as of such date."

3. "No subscriber shall have a secured or preferred claim against any assets of the reciprocal insurer arising out of such operating reserve, but all assets held by such insurer shall be available for the payment of claims of policyholders and creditors of such a reciprocal insurer in preference to any claim for withdrawal by a subscriber as such. Any subscriber's operating reserve accumulated by any such reciprocal insurer shall be maintained at all times, except that a subscriber may, upon withdrawal from membership and cancellation of all insurance contracts held by him in such insurer, and after giving to the attorney-in-fact written notice of withdrawal at least sixty days in advance, withdraw the amount of his operating reserve less such surrender charges as may be deducted pursuant to the subscriber's agreement. No such withdrawal shall be permitted after an order of liquidation, of, or the appointment

of a receiver or liquidating trustee for, any such reciprocal insurer."

Sec. 420: "All of the assets of any reciprocal insurer including subscribers' operating reserves shall be liable primarily for payment of all liabilities incurred under its policies or other contracts. No part of the surplus funds of such reciprocal insurer shall be subject to the claims of general creditors of any of the individual subscribers of such insurer until all policies under which any such subscriber is obligated have been terminated and in no event beyond the amount of such subscriber's operating reserve. The contingent liability of subscribers for additional premiums or assessments shall not be included as an asset in the financial statement of a reciprocal insurer. Subscribers' operating reserves for which notice of withdrawal has been given shall be reported as liabilities until paid. In any statement or report of the financial condition of a reciprocal insurer filed in this state, the surplus to policyholders, after providing for the unearned premium reserves, loss reserves and other liabilties, as required by this chapter, shall be reported as follows: 1. Special contingent surplus; 2. Subscribers' operating reserves; 3. All other surplus, if any."

Sec. 421: "The attorney-in-fact, in addition to the books of account of the collective transactions of all subscribers of the reciprocal insurer, shall keep and maintain a separate account for each individual subscriber, setting forth the entries determining the operating reserve, if any, of such subscriber. Each subscriber's account shall be credited with the premiums earned by him as an underwriter on the policies issued by the exchange and charged with his proper share of all losses incurred under such policies as well as with the expenses incurred by the insurer. Earnings and interest income from investments of all subscribers' operating reserves shall be apportioned and credited to subscribers on the basis of their accumulated operating reserves and all other interest and investment income may be apportioned and credited to the subscribers on the basis of their premiums earned as underwriters."

Sec. 422: 1. "The superintendent may, in his discretion, pursuant to section forty-two, issue a license to a reciprocal insurer domiciled in, or organized under the laws of another state or of any province of the Dominion of Canada, to do in this state such kind or kinds of insurance business as a domestic reciprocal insurer may be authorized to do in this state. Such foreign or alien reciprocal insurer shall comply with substantially the same requirements of this chapter which are applicable to domestic reciprocal insurers hereafter to be organized and authorized to do the same kind or kinds of insurance business and in addition every such alien reciprocal shall be subject to the provisions of this chapter relating to alien insurance companies authorized to do the same kind or kinds of insurance business. Nothing herein contained shall be deemed to require that the attorney-in-fact of a foreign or alien reciprocal insurer shall be resident or domiciled in this state, or shall maintain his or its principal office in this state, or shall be organized under the laws of this state; but every authorized reciprocal insurer shall maintain at least one office in this state."

Sec. 40: 4. "The superintendent may issue a license to any insurer to do in this state the kind or kinds of insurance business for which such insurer is qualified under the provisions of this chapter and under its charter. Every such license shall contain the name of the licensee, its home office address, its principal place of business in this state, the state or country under whose laws it was organized or incorporated, the kind or kinds of insurance business, as defined in this chapter, which it is authorized to do in this state, and the term of such license. The superintendent may refuse to issue or renew any such license if in his judgment such refusal will best promote the interests of the people of this state."

The attack upon the validity of this legislation is based upon the fourteenth Amendment of the Constitution of the United States, the relevant part of which reads as follows:

"• • • No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It has been established by the Supreme Court of the United States that a corporation is not a citizen within the meaning of the equal immunities clause. Paul v. Virginia, 8 Wall. 168.

Corporations do, however, come within the protection of the due process clause. Connecticut General Life Ins. Co., v. Johnson, 303 U. S. 77.

It is contended by the plaintiffs that this legislation and the determination of the defendants to enforce it, constitute a violation of the due process clause. This contention is put forward upon two grounds:

First: That the State of New York has no jurisdiction over the activities of the plaintiff and therefore may not regulate them.

Second: That even if the State had jurisdiction, the regulations which are attacked are arbitrary and unreasonable and without any reasonable relation to the object sought to be attained.

These two grounds deserve and will receive separate consideration.

First, the Court will consider the question of the jurisdiction of the State of New York over these plaintiffs.

It has not been, and can not be, disputed that the documents exchanged by the plaintiffs are insurance contracts; nor that the exchange of them constitutes the carrying on of insurance business. *People v. Roschli,* 275 N. Y. 26.

Neither can it be seriously disputed, in view of the authorities, that the contracts exchanged by the plaintiffs are Illinois contracts. The applications are received in Chicago and they are accepted there. Policies are mailed from Chicago. This makes them, as a matter of law, Illinois contracts of insurance. Minnesota Assn. v. Benn, 261 U. S. 140; Huntington v. Sheehan, 206 N. Y. 486; Stone v. Penn Yan, K. P. & B. Railway, 197 N. Y. 279.

The questions remaining to be considered upon the matter of jurisdiction are 1) whether the plaintiffs are doing business within this state, and 2) whether the State of New York has other interests in these policies, sufficient to justify their regulation.

The evidence discloses the following acts in relation to these policies performed in New York State:

When a canner or wholesale grocer, resident of New York, applies for insurance under this reciprocal scheme, an engineer is sent from the Chicago office. He inspects the property in this state. He explains the operation of the plan. He may have an application blank in his possession and if so, may deliver it to the applicant. Upon acceptance of the application, these engineers "service" the risk. This term is insurance jargon, having reference to the giving of advice, preparation of plans, and other activities which have the purpose of minimizing the risk of fires. In the event of an unusual loss in this state, an inspector is sent from Chicago to examine the premises, in order to determine its extent, and also to discover the cause of the fire, in order that future losses from the same cause may be prevented.

These activities, in the opinion of the Court, are such as to constitute doing business in this state. In reaching this conclusion, the Court puts out of its consideration the fact that the plaintiffs are licensed to do business here. Concededly, a license to do business is not equivalent to doing business. The license may or may not be used. People ex rel. Sea Island Insurance Co. v. Graves, 274 N. Y. 312.

In *Thomas Canning Co. v. Canners Exchange*, 219 Mich. 214, some of the plaintiffs herein were involved. The Court stated, page 222:

"In the name adopted by 'such subcribers contracting among themselves' they have, through their attorney, qualified to carry on their co-operative system of insurance in this State. To the extent the attorney directly or through authorized agents operates in this State by soliciting applications from subscribers for insurance on property within the State, inspects and appraises such property

for that purpose, issues and delivers policies, investigates and pays or adjusts losses through its representative adjuster, or engages in that connection in other insurance activities, it is doing business in this State regardless of whether the policies it issues are to be construed as contracts made in this or another State. Seamans v. Temple Co., 105 Mich. 400 (28 L. R. A. 430, 55 Am. St. Rep. 457)."

The Court would be of this opinion even if the plaintiffs were entities, like corporations, resident of Illinois. The plaintiffs insist, however, that they are not. The names, Warner Reciprocal Insurers, and Canners Exchange Subscribers at Warner Inter Insurance Bureau, are merely convenient terms, they insist, to designate those individuals, firms and corporations which have appointed a common agent or attorney-in-fact to exchange policies of fire insurance. This being so, the acts of the individual members, in reference to such insurance, consummated in this state, must be taken into consideration in weighing the issue whether the plaintiffs are doing business in New York. The plaintiffs can not at the same time "blow hot and cold". Various such acts take place in this state. The reciprocal plan is suggested and recommended by resident subscribers to friends and associates. Questions propounded by the Attorney-in-Fact as to the reputation and standing of applicants are here answered. These are activities of the plaintiffs, and constitute the transaction of insurance business in this state.

The plaintiffs have cited a long line of cases showing that certain acts within a state do not amount to doing business therein. These cases have been carefully examined by the Court and they appear to be clearly distinguishable by reason of one important feature. That is, that the acts done within the state in those cases were done not by the insurance companies, nor by anyone authorized to act on their behalf, but by the insured, or the representatives of the insured.

Thus in the leading case of Allgeyer v. Louisiana, 165 U. S. 578, the act done within the state was the mailing of a notice describing cargoes to be shipped, for the purpose of effecting their inclusion under an open marine policy.

This act was performed not by the insurance company or its agent, but by the insured.

In N. Y. Life Ins. Co. v. Dodge, 246 U. S. 357, as in N. Y. Life Ins. Co. v. Head, 234 U. S. 149, which the Dodge case follows, all acts by the insurance company with reference to the loan agreement were performed elsewhere. All the acts done within the state with reference to such agreement were performed by the insured.

In *People v. Van Amridge*, 266 N. Y. 277, the acts done by the labor union, pursuant to the terms of a group life insurance policy, were done on behalf of its members, the insured, and not on behalf of the insurer. The activities of the insurance company were limited to the District of Columbia, so far as the policy was concerned.

It may be contended however, that even if the plaintiffs are doing business within the State of New York, this does not justify the regulation sought to be imposed; that the doing of business within a state offers no valid ground for the regulation of business done without the state, nor can a state, as a condition for the granting of a license to do business therein, compel a corporation to submit to control of its transactions elsewhere. It is a principle firmly established in our constitutional law, that a state cannot use a conceded power in order to accomplish an unconstitutional result.

In *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426, 434, Justice Holmes states the principle as follows:

"Coming then to the merits, we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result. *Frick v. Pennsylvania*, 268 U. S. 473. *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta*, 256 U. S. 350, 358. *Badders v. United States*, 240 U. S. 391, 394. *United States v. Reading Co.* 226, U. S. 324, 357. Thus the right to exclude a foreign corporation cannot be used to

prevent it from resorting to a federal court. *Terral v. Burke Construction Co.*, 257 U. S. 529; or to tax it upon property that by established principles the State has no power to tax, *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, and other cases in the same volume and later that have followed it; or to interfere with interstate commerce, *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 203; *Looney v. Crane Co.*, 245 U. S. 178, 188. *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 114. A State cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the company has tracks and does business in the State making the attempt. *New York, Lake Erie & Western R. R. Co. v. Pennsylvania*, 153 U. S. 628, 646."

See also N. Y. Life Ins. Co. v. Head, 234 U. S. 149; N. Y. Life Ins. Co. v. Dodge, 246 U. S. 357; Matter of Factory Mutual Liability Ins. Co. v. Behan, 233 A. D. 614.

The plaintiffs assert that New York State may not validly regulate an insurance contract entered into outside its borders, although such contract insures New York property. This position is based upon a long line of decisions by the Supreme Court of the United States, starting with Allgeyer v. Louisiana, 165 U. S. 578.

The *Allgeyer* case involved a Louisiana statute which imposed a penalty for every act, done within the state, in aid of, or to effectuate insurance upon property in the state in any marine insurance company which had not complied with the laws of Louisiana. It was attempted to apply this statute to a case where an open marine policy had been executed in New York. Allgeyer, the insured, had sent a notice by mail from Louisiana to the insurer in New York describing a cargo about to be shipped. Such notification was required by the policy to secure coverage. The Court held that the imposition of a penalty for such act was unconstitutional. It was held that the letter of notification did not constitute a contract entered into in Louisiana. It was "but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside the State." Louisiana citizens were protected by the Fourteenth Amendment in their right to

enter into contracts wherever they pleased, as did the New York insurer to enter into contracts in New York covering property in Louisiana. At pages 590-1, the Court states:

"Has not a citizen of a State, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the State for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the State by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of the *Hooper case* (*supra*) and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the State, and as such was a valid and proper contract. The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the State to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution."

concluding, at page 593, the Court states:

"In such a case as the facts here present the policy of the State in forbidding insurance companies which had not complied with the laws of the State from doing business within its limits cannot be so carried out as to prevent the citizen from writing such a letter of notification as was

written by the plaintiffs in error in the State of Louisiana, when it is written pursuant to a valid contract made outside the State and with reference to a company which is not doing business within its limits."

The principle thus set forth in the Allgeyer case is reiterated in St. Louis Compress Co. v. Arkansas, 260 U. S. 346. Under consideration in that case was a tax imposed by the State of Arkansas, on the gross premiums paid by the insured for the insurance of domestic property in a company not authorized to transact business within the state. In holding such tax invalid, the Court stated: (Holmes, J., page 348)

"The short question is whether this so-called tax is saved because of the name given to it by the statute when it has been decided in *Allgeyer v. Louisiana*, 165 U. S. 578, that the imposition of a round sum, called a fine, for doing the same thing, called an offence, is invalid under the Fourteenth Amendment. It is argued that there is a distinction because the Louisiana statute prohibits (by implication) what this statute permits. But that distinction, apart from some relatively insignificant collateral consequences, is merely in the amount of the detriment imposed upon doing the act. The name given by the State to the imposition is not conclusive. *Child Labor Tax Case*, 259 U. S. 20. *Lipke v. Lederer*, 259 U. S. 557. In Louisiana the detriment was $1000; Here it is five per cent. Upon the premiums—which is three per cent. more than is charged for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the State. This case is stronger than that of *Allgeyer* in that here no act was done within the State, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside. The other limit upon the State's power due to its having permitted the plaintiff in error to establish itself

as alleged, need not be considered here. *Southern Ry. Co. v. Greene*, 216 U. S. 400, 414; *Cheney Brothers Co. v. Massachusetts*, 246 U. S. 147, 157; *Northwestern Mutual Life Insurance Co. v. Wisconsin*, 247 U. S. 132, 140."

This rule has been applied in many decisions of the Supreme Court. See Aetna Life Insurance Co. v. Dunken, 260 U. S. 389; Minnesota Association v. Benn, 261 U. S. 140. The courts of the state have also had occasion to subscribe to it. People ex rel Kirkman v. Van Amridge, 266 N. Y. 277; U. S. Mortgage and Trust Co. v. Ruggles, 258 N. Y. 32; Stone v. Penn Yan K. P. & B. Railway, 197 N. Y. 279; Hammond v. International Railway Co., 63 Misc. 437, aff'd 134 App. Div. 995.

The doctrine of the *Allgeyer* case, as applied and amplified in subsequent decisions, is that the presence of the insured person or property within the regulating state is an immaterial circumstance. Such situs does not confer upon a state the power to regulate. Such power is conferred exclusively to the state where the contract was made.

Signs that the doctrine is not of invariable applicability are evident, however, in other adjudications of the Supreme Court.

In Equitable Life Assurance Society v. Pennsylvania, 238 U. S. 143, the constitutional issue was the validity of a franchise tax imposed by the State of Pennsylvania upon insurance companies doing business therein. Included in the measure of the tax were premiums collected without the state upon insurance of residents of Pennsylvania. The insurance company was licensed in Pennsylvania. The Court sustained the tax, saying, page 146:

"We are dealing with a corporation that has subjected itself to the jurisdiction of the State; there is no question that the State has a right to tax it and the only doubt is whether it may take this item into account in fixing the figure of the tax. Obviously the limit in that regard is a different matter from the inquiry whether the residence of a policy holder would of itself give jurisdiction over the Company. The argument of the state court is that the Company is protecting its insured in Pennsylvania equally whether

they pay their premiums to the Company's agent in Philadelphia or by mail or in person to another in New York.

These are policies of life insurance and according to the statement of the plaintiff in error are kept alive and renewed to residents of Pennsylvania by payments from year to year. The fact that the State could not prevent the contracts, so far as that may be true, has little bearing upon its right to consider the benefit thus annually extended into Pennsylvania in measuring the value of the privileges that it does grant. We may add that the State profits the Company equally by protecting the lives insured, wherever the premiums are paid. The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 162, 163. As to that a certain latitude must be allowed. It is obvious that many incidents of the contract are likely to be attended to in Pennsylvania, such as payment of dividends when received in cash, sending an adjuster into the State in case of dispute, or making proof of death. See *Connecticut Mut. Life Ins. Co.* v. *Spratley*, 172 U. S. 602, 611; *Pennsylvania Lumbermen's Mut. Fire Ins. Co.* v. *Meyer*, 197 U. S. 407, 415. It is not unnatural to take the policy holders residing in the State as a measure without going into nicer if not impracticable details. Taxation has to be determined by general principles, and it seems to us impossible to say that the rule adopted in Pennsylvania goes beyond what the Constitution allows."

Compania de Tabacos v. Collector, 275 U. S. 87, involved the validity of a taxing act of the Philippine Islands. The tax was imposed upon owners of local property obtaining insurance thereon in companies not authorized to do business in the Philippine Islands, to the extent of a fixed percentage of the premiums paid. Such percentage was higher than that charged when the insurance was placed with a licensed insurer. Two policies were involved. One was negotiated in Barcelona, Spain, with a London Company. Another was negotiated, also in Barcelona, Spain, with a Paris company. The London company was authorized to do business in the Philippine Islands. The Paris company was not. In both cases, however, the policies had been executed,

the premiums paid, and the losses were payable outside the Philippine Islands. The tax was upheld as to the contract secured with the London Company. It was held invalid as to the Paris company policy. As to the latter, the majority of the Court felt themselves bound by the *Allgeyer* and *St. Louis Compress* cases. Distinguishing Equitable Life Assurance Society v. Penn., (supra) the Court said: (page 97)

"The case is not in conflict either with the *Allgeyer* case or with the *Compress* case, decided as late as December, 1922. It turns entirely on the fact that the taxpayer had subjected itself to the jurisdiction of Pennsylvania in doing business there, and it was for the state to say what the condition of its doing that business in the matter of the payment of taxes should be. This Court said that the Equitable Society was doing business in Pennsylvania when it was annually paying dividends in Pennsylvania, or sending an adjuster into the state in case of dispute, or making proof of death, and therefore that it was not improper to measure the tax for doing business in the state by the number of individuals whose lives had been insured and with respect to whom, and the execution of whose contracts, the company was necessarily doing business in the state, even if the premiums paid by some of them had not been paid in the state."

In upholding the tax upon the London company policy, the Court stated; page 98:

"• • • We may properly assume that this tax, placed upon the assured, must ultimately be paid by the insurer, and treating its real incidence as such, the question arises whether making and carrying out the policy does not involve an exercise or use of the right of the London Company to do business in the Philippine Islands under its license, because the policy covers fire risks on property within the Philippine Islands which may require adjustment; and the activities of agents in the Philippine Islands, with respect to settlement of losses arising thereunder. This we think must be answered affirmatively under *Equitable Life Society v. Pennsylvania*, 238 U. S. 143. The case is a close one, but in deference to the conclusion we reached in

the latter case, we affirm the judgment of the court below in respect to the tax upon the premium paid to the London Company."

Most persuasive in opposition to applying the doctrine of the Allgeyer case, to the case at bar is *Osborn v. Ozlin*, 310 U. S. 53, decided April 22, 1940. Involved in that case was the validity of a Virginia statute regulating the insurance of Virginia risks. Insurance companies authorized to do business in that state were forbidden to insure Virginia risks except through regularly constituted and registered agents. Such agents are entitled and shall receive the customary commissions, and may not share more than one-half of such commission with a non-resident broker. The action was brought by foreign corporations authorized to do business in Virginia to restrain the enforcement of the statute. The Supreme Court upheld the law and denied the injunction. Mr. Justice Frankfurter, writing for the majority, stated:

"Virginia has not sought to prohibit the making of contracts outside her borders. She merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed. This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia and Virginia's regulation of it". p. 62

The Court proceeds to say, at pages 65-7

"The present case, therefore, is wholly unlike those instances in which a 'so-called right is used as part of a scheme to accomplish a forbidden result.' *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426, 434. *For it is clear that Virginia has a definable interest in the contracts she seeks to regulate* and that what she has done is very different from the imposition of conditions upon appellants' privilege of engaging in local business which would bring within the orbit of state power matters unrelated to any local interests. It is not our province to measure the social advantage to Virginia of regulating the conduct of insurance

companies within her borders insofar as it effects Virginia risks. Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition. The state may fix insurance rates, *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389; it may regulate the compensation of agents, *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U. S. 251; it may curtail drastically the area of free contract, *National Ins. Co. v. Wanberg*, 260 U. S. 71. States have controlled the expenses of insurance companies, New York Insurance Law, Consolidated Laws of New York, c. 28, Sec. 244, and Wisconsin Statutes, Sec. 201.21; and see Report of Joint (Armstrong) Insurance Investigation Committee (N. Y.) pp. 403-18 (1906). They have also promoted insurance through savings banks; see Berman, The Massachusetts System of Savings Bank Life Insurance, Bulletin No. 615, U. S. Bureau of Labor Statistics, and New York Laws of 1938, 3.471. In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business, just as it can operate warehouses, flour mills, and other business ventures, *Green v. Frazier*, 253 U. S. 233; or might take 'the whole business of banking under its control,' *Noble State bank v. Haskell*, 219 U. S. 104, 113. If the state, as to local risks, could thus preempt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in devising and safeguarding protection against local hazards. *LaTourette v. McMaster*, 248 U. S. 465. All these are questions of policy not for us to judge. For it can never be emphasized too much that one's own opinion as to the wisdom of a law must be wholly excluded when one is doing one's judicial duty. The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control.

In reaching this conclusion we have been duly mindful of the cases urged upon us by appellants. In *Allgeyer v. Louisiana*, 165 U. S. 578, apart from the doubts that have

been cast upon the opinion in that case, the state attempted to penalize the making of contracts by its residents outside its borders with companies which had never subjected themselves to local control. Thus the statute was thought to be directed not at the regulation of insurance within the state, but at the making of contracts without. This was followed in *St. Louis Compress Co. v. Arkansas*, 260 U. S. 346; but see the refined distinctions drawn in *Compania de Tabacos v. Collector*, 275 U. S. 87. In *Fidelity & Deposit Co. v. Tafoya, supra*, the Court found that New Mexico had exceeded its power by forbidding 'the payment of any emolument of any nature to any (non-resident) for the obtaining, placing or writing of any policy covering risks in New Mexico. The Court was of the opinion that this statute went 'beyond any legitimate interest of the State. * * *' *ibid.* at 435, but carefully withheld its judgment as to the validity of a later New Mexico statute not unlike the Virginia law here under review."

It is obvious that the majority of the court have departed from restrictive rule of the Allgeyer case. The situs of the insured person or property has become a material factor in the power of a state to regulate or tax. So also has the fact that the corporation challenging the statute is licensed in the state and has thus submitted to regulation.

These factors are both present in the case at bar. The Court concludes that jurisdiction to regulate is not lacking.

This brings under consideration the second ground of attack, addressed to the reasonableness of the regulations. This phase of the inquiry must be approached in the spirit expressed in the *Osborn* case:

"For it can never be emphasized too much that one's own opinion as to the wisdom of a law must be wholly excluded when one is doing one's judicial duty."

The sections requiring the countersigning of policies by a resident agent (130) and the maintenance of an office in this state (422, subsec. 1, and 40 subsec. 4) may be upheld upon the authority of the *Osborn* case and for the reasons there stated. The enforcement of regulations is thus facilitated

and the state is enabled to secure better means of acquiring accurate information for the effectuation of measures which it deems protective of its interests. Of course, if the statute does not apply to any particular transaction, the plaintiffs will be free to resist any attempts by the Superintendent of Insurance to enforce it against them. This action, the Court conceives it, is concerned with the constitutionality of the law. The plaintiffs' contention that these sections will increase the cost of operation is answered by the following quotation from the Osborn case (page 62),

"But the question is not whether what Virginia has done will restrict appellants' freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids. *Alaska Packers Assn.* v. *Comm'n*, 294 U. S. 532; *Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412. Compare *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143. It is equally immaterial that such state action may run counter to the economic wisdom either of Adam Smith or of J. Maynard Keynes, or may be ultimately mischievous even from the point of view of avowed state policy. Our inquiry must be much narrower. It is whether Virginia has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere. Compare *Wallace* v. *Hines*, 253, U. S. 66, 69."

Next to be attacked is the section (Sec. 168(2)) providing for the use of the standard policy form. This policy was framed by the Board of Fire Underwriters and obviously did not have reference to reciprocal insurance. The law recognizes this in granting certain leeways. Subdivision 2 (e). The Court has compared the policies issued by the plaintiffs (Exhibits 8 and 10) with the standard form prescribed by the statute. There are few differences. The description of the insurer, at the beginning of the policy, is authorized by subdivision 2 (a), which provides for printing

the name of the insurer or insurers. The provision for the insertion of a cash premium is inapplicable to this type of insurance, and the plaintiffs may not be compelled to introduce such false provision. The policy used by the plaintiffs contains a provision that the subscribers are severally, not jointly, liable. The paragraph is, generally, authorized by subsection 2 (e), except that the complete negation of joint liability may run contrary to other provisions of the law establishing surplus and reserve funds, and similar sections to be hereafter discussed. If such sections are valid, this paragraph must be amended so as to add a proviso covering such funds. Where the standard policy refers to "Company's Options" (lines 176-7) the plaintiffs may not be prohibited from changing this to read "Subscribers' Option", so as to correspond to realities. With the exceptions here noted, the Court sees nothing unreasonable or arbitrary in the application to the plaintiffs of Sec. 168.

The plaintiffs attack Sections 410 (1) and 415 (1d), dealing with the powers and mode of selection of the advisory committee. It is stated that "subject to the articles of association and the subscribers' agreement" ultimate power and control shall be in such committee. Since the agreement among the plaintiffs contained in the appointment of agent, or attorney, is in negation of such power, this part of Section 410(1) is rendered meaningless. The statute does not purport to change the subscribers' agreement in this respect. Thus interpreted, there is nothing to support the claim of unconstitutionality. Section 415 (1d) requiring the selection of advisors by vote can not be considered an unreasonable regulation.

Section 412 (1) limits new subscribers to those having assets in excess of liabilities in the sum of $10,000. Renewals are limited to those having such assets or, in lieu thereof, have accumulated the operating reserve provided for in Section 418. This provision denies to the small business man the right to secure this type of insurance. Since the uncontroverted proof shows that there is no necessity for such provision, the Court deems it arbitrary, discriminatory, and repugnant to the "due process" clause.

Section 413 (2) provides for the creation of a contingent or guaranty surplus of at least $250,000 which shall not be

impaired or distributed except upon liquidation. Apparently this surplus is to be held by the Attorney-in-Fact. The creation of such fund is not an unreasonable thing. It is a duty common to all who engage in banking or insurance business. The plaintiffs can not hope successfully to challenge this or any other provision merely by pointing out that it differs from the practice hitherto adhered to by them. The necessity for some change is inherent in all regulation.

Section 415 (1), requiring the acknowledgment of the subscribers' agreement, does not appear arbitrary. That it may be more cumbersome or expensive than the present practice is no indication that it is unconstitutional.

Section 417 (1) provides that every contract shall provide for several liability for assessment. The amount of such liability may be limited by the contract to the amount of the annual "premium" or more accurately, the annual deposit. The Legislature may have deemed this provision essential to the protection of resident subscribers. Neither the nature nor the amount of this liability is such as to support the challenge of invalidity.

Section 418 (1) requires each subscriber to build up an operating reserve, by deducting each year not less than one-quarter of his "earnings as an underwriter", until he has accumulated the greater of these two sums; a) twice the amount of his premium, b) his pro-rata share of an aggregate reserve of one-half per cent of the aggregate amount of insurance in force. Since there is no such thing in the plaintiffs' scheme as "earnings as an underwriter", this provision is incapable of application. Furthermore, in view of the provisions previously noted, this is an arbitrary discrimination against reciprocal insurers. Ordinary companies are not compelled to accumulate a reserve of double the amount of their annual premiums. It is pointed out in the record (page 87) that such requirement would put many stock companies out of business.

Sections 418 (3) and 420 deal with the priorities between various claims against operating reserves and assets, Section 418 (3) must fall with subsection (1). The procedure for payment provided for in Section 420, may, as contended by the plaintiffs partake of the characteristics of joint liabil-

ity. This, of itself, is not sufficient to defeat the section. The provision, viewed on its merits, appears reasonable.

Section 421 deals with bookkeeping procedure. The Attorney-in-Fact is required to keep separate accounts for each subscriber. The provision for crediting each with "premiums earned by him" are incapable of application, since no premiums are earned. The "operating reserve" provision has already been held invalid. The last sentence of the section is also inapplicable. Insofar as the section requires the Attorney-in-Fact to maintain a separate account for each subscriber, it corresponds with the procedure already in use by the plaintiffs, and is a valid provision.

The Court concludes, this lengthy opinion, fully realizing that a fuller exposition of the facts might have cast the law in a different light. Constitutional issues are not readily resolved in vacuo. Provisions which may appear arbitrary on their face often take on a different aspect when the underlying factual situation is fully developed. In the absence of such factual proof, the Court has adhered as closely as practicable to the rule of "presumption of constitutionality," enunciated in *O'Gorman & Young* v. *Hartford Insurance Co.*, 282 U. S. 251.

Judgment will be granted in conformity with this opinion. Papers and exhibits may be obtained at Chambers in Kingston.

Dated, December 10th, 1940.

EXHIBIT "B".

SUPREME COURT OF THE STATE OF NEW YORK,
ALBANY COUNTY.

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; HARRY M. BROWN and JAMES T. SMITH, *Plaintiffs,*

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants.*

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation, PAUL E. EMERSON and BEN A. MORTON, *Plaintiffs,*

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants.*

The above entitled actions, having been consolidated and regularly brought on for trial before me at the County Courthouse in the City of Albany, New York, on the 26th and 27th days of March, 1940, at a Trial Term of the Supreme Court; and the plaintiffs Hoopeston Canning Co., E. Pritchard, Inc., Lansing B. Warner, Incorporated, Harry M. Brown, James T. Smith, Paul E. Emerson and Ben A. Morton, having appeared by Wiswall, Walton, Wood and MacAffer, their attorneys, Zane, Trueblood & Johnson, of counsel; and the defendants Louis H. Pink, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney-General of the State of New York, having appeared by John J. Bennett, Jr., Vincent Kiebala, of counsel; and the proofs and allegations of the parties appearing, as aforesaid, having been heard and due deliberation having been had; and the Court having duly rendered and filed its decision herein directing

the entry of judgment as hereinafter provided, and made findings of fact and conclusions of law;

Now on Motion of the Court, it is

1. Adjudged and Declared that Section 130 of the Insurance Law of 1939 by its terms applies only to contracts issued, delivered or otherwise effectuated in the State of New York, and therefore has no application to the contracts of inter-insurance mentioned in the evidence, and that the application of said statute to future transactions shall be left open to be determined as such issue may in the future arise; and it is further

2. Adjudged and Declared that Section 168 Subsection 2, of the Insurance Law of 1939, which provides for the use of the standard policy form, permits certain leeways under Subsection 2(e); that the description of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers at the beginning of each contract of Inter-Insurance used by the plaintiffs is authorized by Subsection 2(a); that said Section 168, Subsection 2, is invalid as against the plaintiffs in the following particulars: the provision for the insertion of a cash premium is inapplicable to plaintiffs' type of inter-insurance, and plaintiffs may not be compelled to introduce such false provision; that the contracts of inter-insurance used by the plaintiffs contain a provision that the Subscribers are severally, not jointly, liable, which paragraph is generally authorized by Subsection 2(e), except that the complete negation of joint liability may run contrary to other provisions of the law establishing surplus and reserve funds, and similar sections hereinafter mentioned; that if such sections are valid, this paragraph must be amended so as to add a proviso covering such funds; that where the standard policy refers to "company's option" (lines 176-7), the plaintiff may not be prohibited from changing this to read "Subscriber's option," so as to correspond to realities. That with the exception herein noted the said statute is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

3. Adjudged and Declared that that part of Section 410, Subsection 1, of the Insurance Law of 1939, which defines the term "Advisory Committee" (the last sentence thereof), is rendered meaningless as applied to plaintiffs' Appointment of Agent and Power of Attorney (Exhibits 5 and 6), and has no application thereto, and that as thus interpreted, the said statute, as against the plaintiffs, is valid and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

4. Adjudged and Declared that Section 412, Subsection (1), of the Insurance Law of 1939, is invalid as against the plaintiffs and repugnant to the Constitution of the State of New York and of the United States; and it is further

5. Adjudged and Declared that that part of Section 413, Subsection 2, of the Insurance Law of 1939, which requires plaintiffs to accumulate and maintain a special contingent surplus or guarantee surplus at the rate of one per cent of the subscriber's alleged net premium income for each year until an amount is accumulated at least equal to the amount of minimum surplus required to be built up, to wit, Two Hundred Fifty Thousand Dollars, without providing for the separate ownership thereof, and provides that the contingent surplus shall not be impaired or paid out by dividend, distributions or by returns of continuing or retiring Subscribers' reserves or deposits, except in the event of liquidation, is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

6. Adjudged and Declared that that part of Section 415, Subsection 1, of the Insurance Law of 1939, which requires Subscribers to execute all Powers of Attorney and Appointments of Agent in a manner sufficient for the acknowledgment of conveyances of real property to be recorded in the state in which the Subscriber is domiciled, is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

7. Adjudged and Declared that that part of Section 415, Subsection 1 (d), of the Insurance Law of 1939, requiring

that the Power of Attorney and Appointment of Agent shall provide for an annual meeting of the Subscribers at which each Subscriber shall have power to vote in person or by proxy for all members of the Advisory Committee to be chosen or appointed at such time, is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

8. Adjudged and Declared that that part of Section 417, Subsection 1, of the Insurance Law of 1939, which requires that every contract of inter-insurance and every Power of Attorney and Appointment of Agent under which contracts of inter-insurance are issued or exchanged shall provide for a contingent, several liability for assessment of the Subscriber as an inter-insurer on the risks of every other Subscriber in an amount of not less than one nor more than ten times the amount of, and in addition to, the alleged annual premium (which the Court holds should more accurately read "annual deposit"), is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

9. Adjudged and Declared that Section 418, Subsection 1, of the Insurance Law of 1939, is invalid and void as against the plaintiffs and repugnant to the Constitutions of the State of New York and of the United States; and it is further

10. Adjudged and Declared that Section 418, Subsection 3, of the Insurance Law of 1939, is invalid and void as against these plaintiffs and repugnant to the Constitutions of the State of New York and of the United States; and it is further

11. Adjudged and Declared that Section 420 of the Insurance Law of 1939 is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

12. Adjudged and Declared that that part of Section 421 of the Insurance Law of 1939, which refers to "premiums earned by him" and "operating reserve," is invalid and void as against the plaintiffs and repugnant to the Constitu-

tions of the State of New York and of the United States; that that part of the said statute which requires the Attorney-in-Fact or Agent to maintain a separate account for each Subscriber is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

13. Adjudged and Declared that that part of Section 422, Subsection 1, of the Insurance Law of 1939, relative to reciprocal insurers maintaining at least one office in the State of New York, and that part of Section 40, Subsection 4, of the said law, relative to the license stating a place of business in the said state, are valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

14. Adjudged and Declared that the defendants, their employees, agents and attorneys be perpetually restrained and enjoined from enforcing or attempting to enforce in any manner whatsoever those provisions of the Insurance Law of 1939 of the State of New York herein held to be either invalid or inapplicable as against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designations of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers.

Dated, March 31, 1941.

Enter:

HARRY E. SCHIRICK,
Justice of the Supreme Court.

Dated, April 5, 1941.

W. B. CLARKE,
Clerk.

EXHIBIT "C".

SUPREME COURT OF THE STATE OF NEW YORK, ALBANY COUNTY

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; HARRY M. BROWN and JAMES T. SMITH, *Plaintiffs*,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants*.

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; PAUL E. EMERSON and BEN A. MORTON, *Plaintiffs*,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants*.

Please Take Notice, that Hoopeston Canning Co., a corporation, E. Pritchard, Inc., a corporation, Lansing B. Warner, Incorporated, a corporation, Harry M. Brown, James T. Smith, Paul E. Emerson and Ben A. Morton, the plaintiffs in the above named actions, heretofore consolidated, hereby appeal to the Appellate Division of the Supreme Court, for the Third Department, from those portions of the final judgment of the Supreme Court, entered herein in the office of the Clerk of Albany County on the 5th day of April, 1941, being the paragraphs of said final judgment numbered 5, 6, 7, 8, 11 and 13 which adjudge and decree that the parts of Section 40, Subsection 4, Section 413, Subsection 2, Section 415, Subsections 1 and 1-(d), Section 417, Subsection 1, Section 420 and Section 422, Subsection 1, of the Insurance Law of 1939, of the State of New York (Chapter 882 of the Laws of 1939, being Chapter 28 of the Consolidated Laws), alleged in the com-

plaints in both actions, are valid and constitutional, as against the plaintiffs and applicable to them, upon the law and upon the facts.

Dated this 5th day of April, 1941.

WISWALL, WALTON, WOOD & MACAFFER,
Attorneys for Plaintiffs-Appellants,
Office & P. O. Address,
90 State Street,
Albany, N. Y.

To: John J. Bennett, Jr., Esq., Attorney-General of New York, Attorney for Defendants-Respondents, Albany, New York; W. B. Clarke, Esq., Albany County Clerk.

EXHIBIT "D".

SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT.

248/50.

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; HARRY M. BROWN and JAMES T. SMITH, *Plaintiffs-Appellants;* HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; PAUL E. EMERSON and BEN A. MORTON, *Plaintiffs-Appellants,*

v.

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants-Respondents.*

Argued May Term, 1941. Decided — Term, 1941.

Before Hon. James P. Hill, Presiding Justice; Hon. John C. Crapser, Hon. F. Walter Bliss, Hon. Gilbert V. Schenck, Hon. Sydney F. Foster, Associate Justices.

Appeal by plaintiffs and defendants from a declaratory judgment entered in the office of the Clerk of Albany County on April 5, 1941.

Wiswall, Walton, Wood & MacAffer, Attorneys for Plaintiffs-Appellants, Office and P. O. Address, 90 State Street, Albany, N. Y. Zane, Trueblood & Johnson (Franklin D. Trueblood and Carl O. Olson, of counsel), Associate Attorneys, Office and P. O. Address, 1210 Harris Trust Building, Chicago, Illinois.

John J. Bennett, Jr., Attorney General (Henry Epstein, Solicitor-General, Vincent Kiebala, Assistant Attorney-General, of counsel), Attorney for defendants-respondents, The Capitol, Albany, N. Y.

Opinion for Reversal.

FOSTER, J.:

The plaintiffs in these actions, for themselves and in their representative capacity, challenge the constitutionality and application of certain portions of the Insurance Law of this state sought to be applied to their method of exchanging contracts of inter-insurance. (Insurance Law, Sections 130, 168, 410, 412, 413, 415, 417, 418, 421, 422). The actions were consolidated before trial and the court below has rendered a declaratory judgment in favor of the plaintiffs as to certain parts of the statute, and against them as to other provisions. Plaintiffs and defendants have appealed from those provisions of the judgment which are contrary to their respective contentions. The controlling issues may be stated as follows: (1) Are plaintiffs engaged in doing any insurance business in the State of New York; and (2) if so, do the statutes in question provide a reasonable regulation of such business.

These cases involve two different groups, those engaged in the canning industry, who insure between themselves, and those engaged in the wholesale grocery business and allied lines, who do likewise. Both groups obtain insurance coverage against loss or damage by fire, and similar hazards, by substantially the same methods, although one group operates through what is called the Canners Exchange and the other through the Warner Reciprocal In-

surers. Lansing B. Warner, Inc., an Illinois corporation, acts as attorney in fact for both groups. The persons, firms and corporations insured are referred to as subscribers, and they exchange reciprocal contracts among themselves, as both *insured* and *insurers*, through the medium of the attorney in fact. All of the subscribers are *insurers* of all risks. Prospective subscribers are required to apply for coverage in writing, and to appoint Lansing B. Warner, Inc., as attorney in fact to act for them in the exchange of insurance. The office of this corporation is in the City of Chicago, and it has no office elsewhere. It maintains an underwriting department which employs trained insurance engineers to procure data with respect to prospective risks, and who consult with subscribers as to methods calculated to diminish hazards. The attorney in fact receives applications from prospective subscribers at its office in Chicago, and has the power to accept or reject an applicant, although it may have the advice of the committee in that regard. It issues policies there, and upon the receipt of a policy the subscriber sends to it a sum of money which is called a deposit. The amount of this is determined by the attorney in fact, who takes into consideration the risk, amount and character of insurance, but it usually conforms to the premium charged by a stock insurance company for a similar risk. This deposit is recorded in the separate account of each subscriber, and held to secure any liability arising out of the exchange of contracts. This liability consists of a subscriber's proportionate share of losses and expenses, determined in the case of the Canners group in the ratio that the amount of insurance bears to the total insurance of all subscribers, and in the Warner group in the ratio that the subscriber's deposit bears to the total deposits. The attorney in fact is authorized to adjust, compromise and settle all claims for losses, to give and receive notice, defend suits, and to appoint a statutory agent in any state or territory for the service of process. It receives as compensation for this service twenty per cent of the deposits, out of which it must pay all expenses of operation, except taxes and counsel fees. In the Warner group it receives as additional compensation one-fifth of

the credit balance left after all losses and expenses are paid. A reserve fund is built up by allocating thereto in the case of each subscriber a portion of the unused deposit. The balance of the deposit is returned to the subscriber at the end of each year as a saving. The reserve fund, if not used, is returned to the subscriber after insurance is discontinued.

The power of attorney provides for the appointment of five advisors from among the subscribers, who meet periodically at the office of the attorney in fact, but these advisors do not function as a body and do not have ultimate power in the control and management of the affairs of the subscribers. It also provides that all contracts of insurance are to be made in the office of the attorney in fact at Chicago. The proof indicates that where an applicant is accepted a contract of inter-insurance, which is in the form of a standard fire insurance policy adapted for reciprocal insurance, is delivered to the subscriber by placing it in the mails at the office of the attorney in fact in the City of Chicago. The proof also shows that most of the contracts are delivered to those who have been subscribers for many years, and that the power of attorney from each is executed but once and continued in force until revoked. The cost of reciprocal insurance provided by this method is from thirty to fifty per cent lower than it would be if the subscribers purchased their insurance from standard companies engaged in the business of insurance. Two reasons are given for this economy. The subscribers, as inter-insurers, insure themselves at actual cost without the use of an expensive agency system which is commonly employed by stock companies. Also the loss ratio appears to be far lower than that of the ordinary stock companies, and this is said to be due to the care with which subscribers are accepted.

It is clearly apparent from the foregoing that the agreements or policies issued by the attorney in fact are contracts of insurance (People v. Roschli, 275 N. Y. 26; Thomas Canning Co. v. Canners Exchange Subscribers at Warner Insurance Bureau, 219 Mich. 214). It follows that plaintiffs are engaged in the insurance business. The question

is whether they are engaged in this business in the State of New York.

Both the Canners Exchange and the Warner Reciprocal Insurers applied to the Superintendent of Insurance of the State of New York in 1930 for a license to transact business in this state as inter-insurers, and their licenses have been renewed from time to time. However, the mere issuance of a license raises no presumption that the licensee is doing business within the state, or that the latter has power to regulate (People ex rel. Sea Ins. Co. v. Graves, 274 N. Y. 312).

Aside from exhibits, the evidence at the trial as to this issue was limited to the testimony of a single witness, the vice-president of the attorney in fact. From his testimony these facts appear. New subscribers usually apply through the recommendation of one already insured. An investigator or engineer, who travels out of the Chicago office, calls upon the prospective subscriber and investigates the risk. He does not solicit but he may explain the plan. His opinion is sought by the attorney in fact as to whether or not a prospective subscriber is eligible. The report of the investigator is made to the Chicago office. Data concerning the credit standing of the prospect and moral qualifications is secured from banks and subscribers in this state. The investigator or insurance engineer may give the prospect a blank form of application and power of attorney; at least there is no rule against such a practice. This application and power of attorney, however delivered, may be, and frequently is, executed where the applicant resides and where the risk is located. After a policy is executed the insurance engineers service the risk by advice as to how the same may be minimized. If there is a substantial loss an appraisal of the loss is made at the site of the property, and the loss is then paid on the basis of such appraisal, but at the Chicago office.

Coupled with the acts indicated in this recital, which may and do take place in this state, there is evidence that the transactions involved are not isolated and sporadic, but show a substantial and continuous course of business. Thus the net deposits of the Canners Exchange upon risks

in this state rose from $105,786.86 in the year 1931 to the sum of $298,284.57 in the year 1938; and during the same period the deposits of the Warner Reciprocal Insurers rose from $28,529.88 to $95,162.82. Losses paid by the Canners Exchange for the same period upon such risks exceeded $600,000.00, and for the Warner group the figure was more than $110,000.00.

Do these facts support the conclusion that plaintiffs are engaged in the business of insurance in this state, as contrasted to the mere insurance of risks located within the state. We think the answer must be in the negative. Applications are received, policies are issued and losses are paid in the State of Illinois. There are no resident agents in the State of New York, nor is any representative of the plaintiffs, resident or otherwise, empowered to receive an application, issue a policy, adjust or pay a loss within the confines of this state. Doing business, according to the commonly accepted meaning of the term, must embrace the power to solicit or the power to bind, or both. These elements are lacking in this case, for plaintiffs project no such authority within the limits of this state. The acts of plaintiffs' agents are limited to only an explanation of the plan, not solicitation; an investigation of the risk, and the appraisal of any loss. These acts are wholly consistent with the right of a resident to secure a foreign contract of insurance, a right which is supported by an impressive array of authorities (Allgeyer v. Louisiana, 165 U. S. 578; St. Louis Compress Co. v. Arkansas, 260 U. S. 346; Aetna Life Ins. Co. v. Dunken, 266 U. S. 389; Minnesota Association v. Benn, 261 U. S. 140; People ex rel. Kirkman v. Van Amringe, 266 N. Y. 277; U. S. Mortgage and Trust Co. v. Ruggles, 258 N. Y. 32; Stone v. Pen Yan K. P. & B. Railway, 197 N. Y. 279). If this right may be abridged merely because of the inspection of risks and appraisal of losses here, then it is a right in theory only and of no practical value. The cases cited, however, emphasize the fact that situs does not confer upon the state the power to regulate. The necessary corrollary to this doctrine is that inspections and appraisals, which have to do with the situs, do not confer such jurisdiction. This doctrine of course

does not apply where a foreign corporation has an agent within this state authorized to represent it for the purpose of doing business. It is then doing business here through its alter ego, a situation which does not exist in this case. On the basis of these considerations we reach the conclusion that plaintiffs are not engaged in the business of insurance in this state, and that contracts between them and others, entered into in the State of Illinois, must be governed by the laws of that state (People ex rel, Sea Insurance Co., v. Graves, supra; Huntington v. Sheehan, 206 N. Y. 486; Knights Templars & Masons Life Indemnit, Co. v. Jarman, 187 U. S. 197). It follows, that under the circumstances disclosed, the State of New York has not the power to regulate the business of plaintiffs, and that statutes which attempt to provide for such regulation are invalid and inapplicable as to them. This conclusion renders it unnecessary to discuss any other issue.

The judgment should be reversed with costs and a judgment entered in conformity herewith.

Bliss, J. (dissenting):

I dissent from the opinion for reversal and vote to affirm the judgment below. I do this principally upon the authority of International Harvester Company vs. Ky., 234 U. S. 579. As in that case we have here a continuous course of a large volume of business and business conduct by the appellants over a considerable period of time in the State of New York. We have agents interviewing prospects, explaining the plan, inspecting the property, recommending changes to reduce the risk and even carrying application blanks. These agents obtained the execution of these applications. The payment of the premiums or "deposits" as they are called, is made within the State of New York. The agents of the insurer are within the state, not occasionally but with uninterrupted continuity, soliciting and obtaining contracts, servicing the risks and adjusting the losses. The agents then keep in constant touch with the subscribers and give the usual fire insurance service. Also the usual insurance methods are followed as to losses. They are investigated and adjusted here, although payment

comes from Chicago, and if no satisfactory adjustment is made suit may be brought in New York. The volume of business thus transacted in New York has been large and has down through the years covered something over 50,000 risks. This all indicates a continuous and steady course of business conduct rather than isolated transactions. We must look to the substance of this insurance business and not merely to its outward form. While there has been a well prepared attempt to avoid the semblance of doing business within our state, when the nature of the business itself is analyzed it cannot be distinguished from that of any other foreign fire insurance doing business here.

I therefore vote to affirm the judgment below.

EXHIBIT "E".

At a Term of the Appellate Division of the Supreme Court, Third Department, held at the County Court House in the City of Albany, N. Y., commencing on the 5th day of May, 1941.

Present: Hon. James P. Hill, Presiding Justice; Hon. John C. Crapser, Hon. F. Walter Bliss, Hon. Gilbert V. Schenck, Hon. Sydney F. Foster, Associate Justices.

SUPREME COURT, APPELLATE DIVISION THIRD DEPARTMENT.

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; HARRY M. BROWN and JAMES T. SMITH, *Plaintiffs-Appellants,*

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants-Appellants.*

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED,

a Corporation, PAUL E. EMERSON and BEN A. MORTON, *Plaintiffs-Appellants,*

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants-Appellants.*

The above named plaintiffs-appellants and the above named defendants-appellants in each of the above entitled actions heretofore consolidated having each appealed to the Appellate Division of the Supreme Court, Third Department, from certain portions of the final judgment entered therein in the office of the Clerk of the County of Albany on the 5th day of April, 1941, and the said appeals having been argued by Franklin D. Trueblood of Counsel for the said plaintiffs-appellants, and by Henry Epstein, Solicitor General, of Counsel for the defendants-appellants, and an opinion for reversal of this court having been handed down on the 2nd day of July, 1941 reversing said final judgment on the law and facts on an opinion by Hon. Sydney F. Foster, Associate Justice, in which Hon. James P. Hill, Presiding Justice, Hon. John G. Crapser and Hon. Gilbert V. Schenck, Associate Justices, concurred, with Hon. F. Walter Bliss, Associate Justice, dissenting in an opinion, and directing that judgment be entered in conformity with such decision and opinion and that findings of fact and conclusions of law inconsistent therewith be reversed and disapproved, and that decision and findings may be settled on five days' notice before Mr. Justice Foster at Liberty, New York.

Now on Motion of Wiswall Walton Wood & MacAffer, attorneys for the said plaintiffs-appellants, it is hereby

Ordered that the final judgment entered in these consolidated actions in the office of the Clerk of the County of Albany on the 5th day of April, 1941, be and the same is hereby reversed on the law and facts, and that judgment be and the same is hereby directed to be entered in conformity herewith; and it is further

Ordered that the findings of fact requested by the de-

fendants Nos. 16, 26 and 28 and the first sentence of the findings of fact requested by the defendants No. 27 and the conclusions of law requested by the defendants Nos. 3, 4, 8, 9, 11, 13, 14, 15, 16, 19 and those parts of the conclusion of law requested by the defendants No. 20 found to be valid and applicable, and each and every one of them be and the same are hereby reversed and disapproved.

It is further Ordered that all other findings of fact and conclusions of law found by the Trial Court pursuant to the requests by both plaintiffs and defendants are hereby approved and affirmed; and in addition this Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact.

1. That the contracts of inter-insurance of the plaintiffs are not performed or made in the State of New York. Inconsistent findings Nos. 22 and 23 at fol. 544 as refused below are reversed and found.

2. That the plaintiffs do not transact any business of insurance within the State of New York.

3. That there are no resident agents in the State of New York of the plaintiffs in each of the above entitled actions, nor is any representative of the plaintiff in each of the above entitled actions, resident or otherwise, empowered to receive an application, issue a policy, adjust or pay a loss within the confines of the State of New York.

4. That the acts of the plaintiffs' engineers are limited to only an explanation of the plan, not solicitation; and investigation of the risk, and the appraisal of any loss.

Conclusions of Law.

1. That the plaintiffs in each of the above entitled actions are not engaged in the business of insurance in the State of New York, and that contracts between them and others, entered into in the State of Illinois, must be governed by the laws of that state;

2. That the State of New York has not the power to regulate the business of the plaintiffs in each of the above en-

titled actions, and that statutes which attempt to provide for such regulation are invalid and inapplicable as to the plaintiffs in each of the above entitled actions.

And it is further Ordered that judgment be entered adjudging and declaring

1. That those portions of the Insurance Law of 1939 of the State of New York alleged in both complaints in the above entitled actions, and each and every part thereof, are invalid, unconstitutional and inapplicable as against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designations of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers.

2. That the defendants, their successors in office, their employees, agents and attorneys be perpetually restrained and enjoined from enforcing, or attempting to enforce in any manner whatsoever those portions of the Insurance Law of 1939 of the State of New York alleged in the said complaints and each of them, against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designations of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers.

Dated at Liberty, N. Y., August 26, 1941.

SYDNEY F. FOSTER,
Justice Supreme Court,
Appellate Division,
3rd Department.

A true copy.
JOHN S. HERRICK, *Clerk.*
Ent. 9/2/41.

EXHIBIT "F".

SUPREME COURT, COUNTY OF ALBANY.

HOOPESTON CANNING CO., a Corporation, E. PRITCHARD, INC., a Corporation, LANSING B. WARNER, INCORPORATED, a Corporation, HARRY M. BROWN and JAMES T. SMITH, *Plaintiffs-Appellants*,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney General of the State of New York, *Defendants-Appellants*

HOOPESTON CANNING CO., a Corporation, E. PRITCHARD, INC., a Corporation, LANSING B. WARNER, INCORPORATED, a Corporation, PAUL E. EMERSON and BEN A. MORTON, *Plaintiffs-Appellants*,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney General of the State of New York, *Defendants-Appellants*

The above named plaintiffs-appellants and the above named defendants-appellants in each of the above entitled actions heretofore consolidated having each appealed to the Appellate Division of the Supreme Court, Third Department, from certain portions of the final judgment entered therein in the office of the Clerk of the County of Albany on the 5th day of April, 1941, and the said appeals having duly come on to be heard before the Appellate Division of the Supreme Court, Third Department, at a Term held at the County Court House in the City of Albany commencing on the 5th day of May, 1941, and the said appeals having been argued by Franklin D. Trueblood, of counsel for the said plaintiffs-appellants, and by Henry Epstein, Solicitor General, of counsel for the defendants-appellants, and an order of the said Appellate Division having been made and entered reversing said final judgment on the law and facts and directing that judgment be entered in conformity therewith, and that certain findings of fact and con-

clusions of law be reversed and disapproved, and making certain additional findings of fact and conclusions of law.

Now, on motion of Wiswall, Walton, Wood & MacAffer, attorneys for the said plaintiffs-appellants, it is hereby

Adjudged that the aforesaid final judgment entered in the office of the Clerk of the County of Albany on the 5th day of April, 1941, be, and the same hereby is reversed on the law and facts; and it is further

Adjudged and Declared

1. That those portions of the Insurance Law of 1939 of the State of New York alleged in both complaints in the above entitled actions, and each and every part thereof, are invalid, unconstitutional and inapplicable as against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designations of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers.

2. That the defendants, their successors in office, their employees, agents and attorneys be perpetually restrained and enjoined from enforcing, or attempting to enforce in any manner whatsoever those portions of the Insurance Law of 1939 of the State of New York alleged in the said complaints and each of them, against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designations of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers.

Dated Sept. 2nd, 1941. Enter.

W. B. CLARKE,
Clerk.

EXHIBIT "G".

STATE OF NEW YORK.
SUPREME COURT, COUNTY OF ALBANY.

HOOPESTON CANNING CO., a Corporation, E. PRITCHARD, INC., a Corporation, LANSING B. WARNER, INCORPORATED, a Corporation, HARRY M. BROWN and JAMES T. SMITH, *Plaintiffs-Appellants,*

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney General of the State of New York, *Defendants-Appellants*

HOOPESTON CANNING CO., a Corporation, E. PRITCHARD, INC., a Corporation, LANSING B. WARNER, INCORPORATED, a Corporation, PAUL E. EMERSON and BEN A. MORTON, *Plaintiffs-Appellants,*

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney General of the State of New York, *Defendants-Appellants*

SIRS:

Please Take Notice that the above named Louis H. Pink, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney General of the State of New York, defendants-appellants in the above named actions, heretofore consolidated, hereby appeal to the Court of Appeals of the State of New York from the final order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of said Court on the 2nd day of September, 1941, and a certified copy whereof was entered in the office of the Clerk of the County of Albany on the 2nd day of September, 1941, from the judgment entered thereon in the office of the Clerk of the County of Albany on the same date, which reversed upon the law and facts a final judgment of the Supreme Court, Albany County, entered in the office of the Clerk of Albany County on the 5th day of April, 1941, and from

each and every part of said first mentioned order and judgment.

Dated Albany, New York, September 15, 1941.

Yours, etc.,

JOHN J. BENNETT, JR.,
Attorney General,
Attorney for Defendants-Appellants,
Office and Post Office Address, The Capitol, Albany, New York.

To:

WISWALL, WALTON, WOOD & MACAFFER, ESQS.,
Attorneys for Plaintiffs-Appellants,
Office and Post Office Address, 90 State Street, Albany, New York.

W. B. CLARKE, ESQ.,
Albany County Clerk,
Albany, New York.

EXHIBIT "H".

HOOPESTON CANNING CO., INC., et al., Respondents, v. LOUIS H. PINK, as Superintendent of Insurance of the State of New York, et al., Appellants.

(Decided June 4, 1942.)

Appeal from a judgment entered September 2, 1941, upon an order of the Appellate Division of the Supreme Court in the third judicial department which (1) reversed, on the law and the facts, a declaratory judgment entered upon a decision of the court at a Trial Term (Sch...ick, J.) and (2) directed the entry of judgment, upon additional findings, in conformity with its opinion. (See 262 App. Div. 446.)

John J. Bennett, Jr., Attorney-General (Henry Epstein, Vincent Kiebala and *Milton Kaplan* of counsel), for appellants.

Franklin D. Trueblood and *Carl O. Olson* for respondents.

CONWAY, *J.:*

This is an action seeking a declaratory judgment that certain sections, or portions thereof, of the Insurance Law

(Cons. Laws, ch. 28), as amended in 1939, relating to the regulation of foreign reciprocal insurers authorized to transact the business of insurance within New York State, are illegal and invalid in so far as they purport to affect two licensed foreign reciprocal insurers or inter-insurers. The two groups are known as the Canners Exchange Subscribers at Warner Inter-Insurance Bureau, hereinafter called Canners, and Warner Reciprocal Insurers, hereinafter called Warner.

In 1930 Canners was authorized to transact within this State the business of fire, lightning, hail, windstorm, use and occupancy and sprinkler leakage insurance, pursuant to the then existing provisions of section 305 of the Insurance Law. It has continued to be so authorized to date. There are approximately 976 persons, firms and corporations engaged in the canning industry who are subscribers and approximately ninety-three of them are located in New York State. This action was brought by plaintiffs in a representative capacity on behalf of all the subscribers in Canners. Under the plan each subscriber insures all other insurers and in turn is insured by them. There is an exchange of indemnity among the subscribers evidenced by insurance policies. The exchange of so many policies with the necessity of affixing signatures thereto would be impracticable. Each of the subscribers, therefore, appoints an attorney-in-fact by executing a power of attorney. The attorney-in-fact is Lansing B. Warner, Inc., which has its only office in Chicago, Ill. The appointment authorizes the attorney-in-fact to execute the reciprocal insurance policies, to exchange the contracts of inter-insurance, to receive deposits, to give and receive notices and adjust claims, to bring, defend, compromise or adjust suits at law or in equity and to appoint an agent or representative in any State upon whom process may be served and to perform such other acts as may be necessary. It is a continuing power of attorney and under it subsequent reciprocal insurance contracts are executed. The consideration for the contracts of reciprocal insurance is the exchange of idemnity among subscribers. The obligation of the subscriber is several, separate and individual. To secure his liabilty in the exchange of contracts, the subscriber agrees to deposit with the attorney-in-

fact a sum of money to be designated "Expense and Guarantee Fund," together with a further sum of ten dollars to be designated "Reserve Fund" which may be increased to an average amount of two dollars for each $1,000 of insurance carried by the subscriber. The liability of the subscriber is only such proportionate share of the insurance granted under his policy as the reserve fund deposit of the subscriber bears to the aggregate reserve fund deposits of all subscribers. The power of attorney further provides for the creation of an advisory committee of five members prominent in the canning industry. Their duties are supervisory and they have custody of the funds deposited and are consulted before any new subscriber is admitted. The compensation of the attorney-in-fact is twenty per cent of the expense and guarantee fund due from each subscriber. In return the attorney-in-fact agrees to pay all expenses except certain enumerated ones.

Ordinarily, a canner in this State who wishes to become a subscriber writes to Lansing B. Warner, Inc., at its office in Chicago, Ill., inquiring about the plan. Usually this is done after one of the subscribers in this State has recommended the plan to him. Sometimes the subscriber himself writes, asking the attorney-in-fact to explain the plan to a prospective applicant. Thereupon an inspector or engineer of Canners from Chicago calls upon the prospective applicant at his place of business in New York to explain the plan and its operation and for the purpose of investigating his properties and determining whether in that respect he is eligible to be a subscriber. At the same time the attorney-in-fact also consults with subscribers to determine the standing of the applicant in his community, his reputation for honesty, his "general housekeeping ability and carefulness" and his credit, a report upon which is also obtained from the prospective subscriber's bank. The engineer reports back to the Chicago office and makes a recommendation as to whether an application blank should or should not be sent to the prospective applicant. The attorney-in-fact makes the decision. The application blank when forwarded is accompanied by a power of attorney both of which are to be signed by the prospective applicant and returned by mail

to Chicago, together with a deposit in the amount requested. The amount of the deposit is determined by the attorney-in-fact and is based on the amount of indemnity desired and the physical characteristics and hazards of the subscriber's property. After the acceptance of the application, the engineers of the exchange "service the risk" so as to minimize the risk of loss. A fire insurance policy written on a standard form, approved by the Superintendent of Insurance of this State, is signed by the attorney-in-fact and mailed from Chicago to the Subscriber.

The exchange employs twenty-five or twenty-six trained insurance engineers specializing in fire insurance hazards. They inspect physical properties, investigate the moral hazard of a prospective subscriber and explain the plan of reciprocal insurance to him. These men travel out from Chicago and consult with subscribers as to methods for reducing fire hazards on properties insured, such as by building fire walls, putting in wire glass windows and by other methods familiar to insurance engineers. In the event of a large loss an inspector or engineer is sent from Chicago to examine the property affected and to report back. Upon the basis of his findings the loss is paid from Chicago by the attorney-in-fact. The inspector or engineer has authority to investigate the cause of the fire so that steps may be taken to prevent a similar future loss.

Prior to 1936 no taxes were paid to the State of New York. In 1935, the Insurance Law, section 34, was amended so as to provide for the payment of a premium tax for the privilege of doing business in this State. The Superintendent of Insurance of the State determined that the statute, as amended, was applicable to inter-insurers. A report on premium income so taxable was filed for the year 1935 and taxes for that year were paid under protest. Reports for succeeding years have been filed and taxes paid without protest. The total of the taxes paid by Canners and Warner for the years 1935 to 1938 is $16,026.39.

The annual statements filed with the Superintendent of Insurance of the State by Canners for the years 1931-1938, inclusive, show that, except for the years 1932 and 1933, the gross risks written in this State have increased pro-

gressively from approximately $23,000,000 to $81,000,000; the net risks from approximately $8,000,000 to $32,000,000.

The second group consists of wholesale grocers who are reciprocal insurers under the name of Warner Reciprocal Insurers and they operate under substantially the same plan as do the subscribers of Canners. The principals in this group, however, execute a document known as "Appointment of Agent" instead of a power of attorney. The same corporation which is attorney-in-fact for the subscribers of Canners is agent for the principals of Warner. The appointment of agent provides that the principals shall deposit with the agent at Chicago a sum designated "Guaranty Deposit," the amount of which is to be determined by the agent in accordance with the risk, amount and term of insurance. The liability of the principal is "several, separate and not joint." Provision is made for "Advisors," similar to those on the advisory committee of Canners and for compensation of the agent. The risks are serviced by the underwriting and engineering department of the agent.

The plaintiffs represent approximately 2,100 persons, firms and corporations constituting the principals in Warner of whom approximately 230 are located in this State. The gross risks of Warner in this State were approximately $7,000,000 in 1931 and $38,000,000 in 1938.

Plaintiffs allege that although Insurance Law, section 414, subdivision 2 (Cons. Laws, ch. 28), allows to every authorized foreign reciprocal insurer one year after the effective date of the chapter, January 1, 1940, to revise its subscribers' agreement and its articles of association, if any, so as to conform to the regulations applicable to reciprocal insurers thereafter to be organized under Insurance Law, article 12, that many provisions of the chapter including portions of sections 130, 168, subdivision 2, 410, subdivision 1, 412, subdivision 1, 413, subdivision 2, 415, subdivision 1, 417, subdivision 1, 418, subdivision 3, 420, 421, 422, subdivision 1, and 422, subdivision 2, will become *prima facie* applicable to the two insurers and their subscribers and principals and will "dislocate" their present plan of insurance so as to cause irreparable injury. Therefore, they pray that those sections or subdivisions of sec-

tions be declared invalid, unconstitutional and void as against the plaintiffs and the subscribers and principals of the respective insurers.

Special Term found facts from which it concluded that Canners and Warner were doing business in this State. The Appellate Division reversed three and a portion of a fourth finding of fact. The three findings reversed are the following:

"16. All the subscribers in both groups are associated in the common aim or purpose of receiving and giving indemnity in case of loss. The liability of each Subscriber is to pay his part of the losses and expenses in the ratio that his deposit bears to all the deposits."

"26. The insurance engineers carry blank forms of appointment of agent and power of attorney. These are furnished to prospective subscribers by the insurance engineers upon request. The power of attorney or appointment of agent is fully executed, in the State of New York. It is complete when the prospective subscriber affixes his signature in this state, oftentimes in the presence of the insurance engineer."

"28. In case of loss, particularly a large one, the insurance engineers investigate the cause of the loss and the extent thereof. The investigation with respect of the loss is made in the State of New York."

There was a reversal of the following sentence in finding 27:

"The premiums or deposits are paid with checks drawn on New York State banks."

The weight of the evidence was clearly with Special Term as to findings 16 and 28. As to finding 27, it is unimportant whether the premiums or deposits were paid by checks drawn on New York State banks. As to finding 26, the weight of the evidence as to the findings in the first two sentences is with the Appellate Division but the findings are unimportant. As to the remaining two sentences, they constitute mixed findings of fact and conclusions of law.

In so far as it was found that the power of attorney or appointment of agent was signed in this State by the prospective subscriber and principals, the weight of the evidence is with Special Term.

Taking the unreversed findings of Special Term and those which were reversed but which are supported by the weight of the evidence, the conclusion of law of Special Term numbered 3 that "The plaintiffs are doing the business of insurance in the State of New York" follows of necessity. Each subscriber and each principal is an insurer and initiates within this State his contract of inter-insurance. This is not a situation where the applicant for insurance to be issued to him solely as an *insured* mails an application for that insurance to a foreign company in a foreign State. In this instance the insurer, resident here, signs a power of attorney or appointment of agent within this State and confers thereby power upon the attorney or agent to execute for him a policy of insurance so that he, our resident, may become the insurers reciprocally of hundreds of risks throughout this country and in Canada. Our resident is an insurer and it matters not where his attorney or agent executes the contract of insurance by which he is bound. Thus Insurance Law, section 41, subdivision 3, now provides: "The term 'doing an insurance business,' within the meaning of this chapter, shall be deemed to include (a) the making, as insurer, or *proposing to make as insurer*, of any insurance contract * * *." The two reciprocal insurers are but the aggregations of the subscribers and principals. (Ins. Law, § 410.)

There is another reason why plaintiffs may not have the declaratory judgment they seek

The contention of the plaintiffs in this: That the two insurers have been authorized by the Superintendent of Insurance of the State to transact insurance business here but, despite such authorization, are not transacting any business in this State; that although so *authorized* and *licensed*, since they are not transacting business here, they are not subject to our statutory regulation of *authorized* reciprocals but must be treated as though foreign *unauthorized* reciprocal insurers; that as such foreign recip-

rocal insurers not doing business here, New York State may not regulate their insurance contracts or conduct here because such attempted regulation would run counter to the rule announced in *Allgeyer* v. *Louisiana* (165 U. S. 578) and subsequent authorities holding similarly.

Plaintiffs concede that the two insurers sought authorization to transact business within this State for two reasons: *First*, each subscriber and principal within this State is enabled to serve process upon the Superintendent of Insurance and thus sue the two insurers in our courts upon losses suffered here, and *second*, the licenses enable the insurers to file with and to have audited by the New York Superintendent, annual statements which are available for examination by resident subscribers and principals. In addition subscribers and principals know that the minimum capital and the assets of the insurers, since they have been licensed here, must be substantially the same as those of domestic insurers. (Ins. Law, §§ 42, 90.) These considerations are helpful competitively in obtaining insurance business. That much the two insurers desire. The position they seek to maintain, however, is that since, although authorized, they transact no business here, they may not be held subject to our statutes applicable to authorized reciprocal insurers in other respects but must be treated as though unauthorized.

We must bear in mind in considering the contention of Canners and Warner that the Legislature imposed only the same conditions upon them as foreign insurers as were imposed upon domestic insurers, in so far as obtaining a license to do business within this State is concerned. We make no distinction. Thus Insurance Law, section 414, subdivision 2, reads as follows: "Every such *existing reciprocal insurer* and *every authorized foreign reciprocal insurer*, shall, within one year after the effective date of this chapter, have so revised its subscribers agreement and its articles of association, if any, as to conform to the requirements applicable to reciprocal insurers hereafter to be organized under the provisions of this article." Domestic reciprocal insurers are organized under section 411 of the article. Insurance Law, section 422, is entitled *Foreign or alien reciprocal insurers* and provides for the licens-

ing of a reciprocal insurer of another State or of the Dominion of Canada. The section, subdivision 1, then provides: "* * *. Such foreign or alien reciprocal insurer shall comply with substantially the same requirements of this chapter which are applicable to domestic reciprocal insurers hereafter to be organized and authorized to do the same kind or kinds of insurance business * * *."

Requirements such as these are not attempts to control the operations of foreign insurers outside the State of New York and thus to exercise extraterritorial power. (*Firemen's Ins. Co.* v. *Beha*, 30 Fed. Rep. (2d) 539; affd., 278 U. S. 580.) There the court said (at p. 542):

"The second constitutional ground is that the statute, if it requires, as a condition upon the grant of the plaintiff's license, that it conform its investments in New Jersey to the provisions of the New York law respecting domestic corporations, attempts to control its operations outside New York, and thus to exercise an extraterritorial power. If so, then any other New York statute which subjected foreign insurance companies to the same regulations as domestic in respect of their solvency would be unconstitutional, unless it could be complied with by conduct taking place only in New York, which it seldom could. For example, a state might not prescribe the necessary proportion between the assets and liabilities of a foreign insurance company, or the amount of its cash capital, as a condition to its doing business within its borders. * * *

"Perhaps the power may be limited by the purpose and the fitness of the measure to accomplish it; but, whether that be true or not, when so limited it is not further circumscribed by the indirect effects of its operation. As we have said, scarcely any condition can be imposed touching the financial stability of a foreign corporation, which will not involve some results elsewhere; it is enough that these be ancillary to the accomplishment of genuinely local purposes connected with the company's prospective business. Otherwise each state could set the standard of security for the rest of the Union, an intolerable limitation upon the autonomy of each community."

Let us now consider the sections of which complaint is

made by the plaintiffs. Section 412, subdivision 1, provides that no *authorized* reciprocal insurer shall make any new agreement for insurance with any person, firm or private corporation who or which does not have assets in an amount not less than $10,000 in excess of liabilities. This applies to domestic and foreign reciprocals. Our Legislature has determined that this provision is advisable for the protection of our residents. If Canners or Warner is not *authorized* or *licensed* here, and transacts no insurance business here, the statute is not applicable. Neither insurer need be authorized in this State but if it is, it is clear that it must comply with the statute. Section 415, subdivision 1, provides that every subscriber of an *authorized* reciprocal insurer "shall have executed a subscriber's agreement," and every subscriber shall execute and duly acknowledge the same in a manner sufficient for the acknowledgment of conveyances of real property to be recorded in the State of the subscriber's domicile and that each agreement shall contain certain designated provisions. This applies to domestic and foreign reciprocals. Since the two insurers are licensed, this section is applicable. So it is as to sections 168, subdivision 2, 410, 413, subdivison 2, 417, subdivision 1, 418, subdivisions 1 and 3, 420, 421 and 422, subdivision 2.

As to section 130 a different problem is presented. That section provides, in substance, that "no licensed foreign" insurer shall in this State issue, deliver or otherwise effectuate any contract of insurance covering certain persons, properties or risks "unless such contract of insurance is issued or effectuated through, or countersigned by, a resident licensed insurance agent of this state." Canners and Warner contend that they have never issued, delivered or otherwise effectuated a contract of insurance in this State. If that were so, section 130 would be inapplicable to them. It is, however, applicable because, as indicated above, they are doing business here.

The judgments should be reversed and the complaint dismissed, with costs in all courts.

LEHMAN, *Ch. J.*, LOUGHRAN, FINCHA RIPPEY, LEWIS and DESMOND, *JJ.*, concur.

Judgments reversed, etc.

EXHIBIT "I".

COURT OF APPEALS.

STATE OF NEW YORK, *ss:*

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 4th day of June, in the year of our Lord one thousand nine hundred and forty-two, before the Judges of said Court.

Witness, The Hon. Irving Lehman, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—June 5, 1942.

HOOPESTON CANNING CO., &c., & ORS., *Respondents,*

vs.

LOUIS H. PINK, as Superintendent of Insurance, &c., & ano., *Appellants.*

HOOPESTON CANNING CO., &c., & ORS., *Respondents,*

vs,

SAME, *Appellants.*

BE IT REMEMBERED, That on the 3rd day of November, in the year of our Lord one thousand nine hundred and forty-one, Louis H. Pink, as Superintendent of Insurance, &c., and another, the appellants in this cause, came here unto the Court of Appeals by John J. Bennett, Jr., Attorney-General, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Hoopeston Canning Co., &c., and others, the respondents in said cause, afterwards appeared in said Court of Appeals by Wiswall, Walton, Wood & MacAffer, their attorneys.

Which said Notice of Appeal, and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Henry Epstein of counsel for the

appellants, and by Mr. Franklin D. Trueblood (Chicago, Ill.) of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgments herein be and the same hereby are reversed and the complaint dismissed with costs in all courts.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgments be reversed and the complaint dismissed with costs in all courts, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ JOHN LUDDEN,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE.

Albany, June 5, 1942.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[Seal State of New York. Court of Appeal.]

/s/ JOHN LUDDEN,
Clerk.

EXHIBIT "J".

At a Special Term of the Supreme Court, Albany County, held in and for the County of Albany, at the Court House, in the City of Albany, State of New York, on the 23rd day of June, 1942.

Present Hon. Riley H. Heath, Justice

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; HARRY M. BROWN and JAMES T. SMITH, *Plaintiffs*,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants*.

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; PAUL E. EMERSON and BEN A. MORTON, *Plaintiffs*,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants*.

The above named defendants having appealed to the Court of Appeals of the State of New York from the judgment of reversal of this Court entered upon the order of the Appellate Division of the Supreme Court, Third Department, in the office of the Clerk of the County of Albany, on the 2nd day of September, 1941, reversing a judgment for defendants heretofore entered herein in the office of the said Clerk on the 5th day of April, 1941, and from each and every part of said judgment of reversal and order of reversal as well as from the whole thereof; and the said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having order- and adjudged that the said judgment so appealed

from as aforesaid be reversed and the complaint dismissed with costs in all Courts, and having ordered and adjudged that the proceedings therein be remitted to this Supreme Court thereto be proceeded upon according to law;

Now, on reading and filing the remittitur from the said Court of Appeals herein, and upon motion of John J. Bennett, Jr., Attorney-General, Attorney for the defendants herein, it is hereby

Ordered that the order and judgment of the said Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter.

RILEY H. HEATH,
J. S. C.

EXHIBIT "K".

SUPREME COURT, STATE OF NEW YORK, COUNTY OF ALBANY.

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; HARRY M. BROWN and JAMES T. SMITH, *Plaintiffs,*

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants.*

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; PAUL E. EMERSON and BEN A. MORTON, *Plaintiffs,*

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants.*

The above named defendants having appealed to the Court of Appeals of the State of New York from the

judgment of reversal of this Court entered upon the ord
of the Appellate Division of the Supreme Court, Thi
Department, in the office of the Clerk of the County
Albany, on the 2nd day of September, 1941, reversing
judgment for defendants heretofore entered herein in t
office of the said Clerk on the 5th day of April, 1941, a
from each and every part of said judgment of reversal a
order of reversal as well as from the whole thereof; a
the said appeal having been duly argued at the said Cou
of Appeals, and after due deliberation the Court of A
peals having ordered and adjudged that the said judgme
so appealed from as aforesaid be reversed and the co
plaint dismissed with costs in all Courts, and having order
and adjudged that the proceedings therein be remitted
this Supreme Court there to be proceeded upon accordi
to law; and the remittitur from the said Court of Appe
having been filed herein, and the order having been enter
herein making the order and judgment of the said Cou
of Appeals the order and judgment of this Court;

Now on motion of John J. Bennett, Jr., Attorney-G
eral, attorney for the defendants herein, it is hereby

Ordered and Adjudged that the order and judgment
said Court of Appeals be and the same hereby are ma
the order and judgment of this Court; and it is further

Ordered and Adjudged that the said judgment enter
herein on the nd day of September, 1941, be and the sa
hereby is reversed and the complaint dismissed; and it
hereby

Ordered and Adjudged that the defendants recover
the plaintiffs the sum of $585.05 costs as taxed, and th
the defendants have execution therefor.

Judgment signed and entered this 23rd day of June, 19

W. B. Clarke, Cle